IN THE MATTER OF:

THE LOEWEN GROUP, INC. and RAYMOND L. LOEWEN,

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent/Party.

NOTICE OF CLAIM

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I. INTRODUCTION

1. Pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA"), investors The Loewen Group, Inc. ("TLGI"), a Canadian corporation, and Raymond L. Loewen, a Canadian citizen who has invested in TLGI, submit to arbitration this claim for damages inflicted upon them and upon Loewen Group International, Inc. ("LGII"), a United States corporation owned and controlled by TLGI. TLGI and LGII (collectively "Loewen") suffered these damages as a direct result of several NAFTA breaches committed during litigation filed against Loewen in the Mississippi state courts by Jeremiah O'Keefe, Sr., his son, and various of their family-owned companies (collectively "O'Keefe"). Mr. Loewen also suffered damages arising out of the same breaches.

2. The *O'Keefe* litigation arose out of a commercial dispute between O'Keefe and Loewen, who were competitors in the funeral home and funeral insurance industries in Mississippi. The dispute involved three contracts between O'Keefe and Loewen valued by O'Keefe at $980,000, and one alleged contract involving in principal part a proposed exchange of two O'Keefe funeral homes worth approximately $2.5 million for a Loewen funeral insurance company worth approximately $4 million.

3. The Mississippi jury awarded O'Keefe $500 million in damages, including $74 million in damages for emotional distress and $400 million in punitive damages. The $500 million verdict was by far the largest in Mississippi history, was 78% of Loewen's entire net worth, and was over 100 times greater than the entire net worth of the companies to be exchanged in the principal underlying transaction. The $400 million punitive damages award was 50 times greater than the largest punitive damages award ever considered by the Mississippi Supreme Court, and more than 200 times greater than the largest punitive damages award ever upheld by that court. Even by United States standards, the verdict was grossly excessive.

4. The $500 million verdict was the product of a seven-week trial infected by repeated appeals to the jury's anti-Canadian, racial, and class biases. Throughout the trial, the court repeatedly allowed O'Keefe's attorneys to make extensive, irrelevant, and highly prejudicial references to: (i) Loewen's "foreign" Canadian nationality, which was contrasted to O'Keefe's Mississippi roots and his willingness to "fight for his country" (the United States) during World War II; (ii) race-based distinctions between O'Keefe and Loewen — including explicit testimony that O'Keefe was not racist, which was contrasted with testimony implying that Loewen and its Chairman, Raymond Loewen, were racist (indeed, the judge himself concluded during the trial, without disapproval, that O'Keefe had played "the race card"); and (iii) class-based distinctions between Loewen, which was portrayed as a large, wealthy corporation, and O'Keefe, who was portrayed as running family-owned businesses.

5. Loewen attempted to appeal the $500 million verdict and judgment, but was prevented from doing so by the arbitrary application of an appellate bond requirement. Mississippi law requires an appeal bond for 125% of the judgment, but allows the bond to be reduced or eliminated for "good cause." There was "good cause" to reduce the appeal bond in this case because (i) the patently excessive judgment almost certainly would have been reduced or vacated on appeal, (ii) the cost to Loewen of posting a full bond would have substantially exceeded $200 million, which Loewen could not have recovered even if it had prevailed on appeal, and (iii) Loewen offered to post a bond for $125 million (125% of the *compensatory* award) and, in order to fully protect O'Keefe's interest as a judgment creditor, to allow court control of its financial transactions while its appeal was pending.

6. By refusing to permit *any* reduction of the bond, the Mississippi courts effectively foreclosed Loewen's appeal rights. On January 24, 1996, the Mississippi Supreme Court required

Loewen to post a $625 million bond within seven days. Rather than incur over $200 million in non-recoverable costs, Loewen was forced to settle the case under conditions of extreme duress. On January 29, 1996, Loewen settled for $175 million what had begun as a commercial dispute involving transactions worth, in the aggregate, substantially less than $5 million.

7. Several NAFTA provisions were breached during the *O'Keefe* litigation. For example, by admitting extensive anti-Canadian and pro-American testimony and by allowing O'Keefe's counsel to make repeated anti-Canadian and pro-American comments, the trial court violated Article 1102 of NAFTA, which bars discrimination against foreign investors and their investments. That illegal discrimination was, in essence, ratified by the Mississippi Supreme Court's refusal to reduce the bond requirement. Similarly, by permitting the extensive nationality-based, race-based, and class-based testimony and counsel comments, the trial court violated Article 1105 of NAFTA, which imposes a minimum standard of treatment for investments of foreign investors. Article 1105 was also violated by the grossly excessive verdict and judgment and by the Mississippi courts' arbitrary application of the bonding requirement. Finally, the discriminatory conduct, the excessive verdict, the denial of the right to appeal, and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated expropriation of investments of foreign investors.

8. At the request of counsel for Loewen, Sir Robert Jennings, Q.C., former President of the International Court of Justice, reviewed the record of the *O'Keefe* litigation. He concluded that the verdict and judgment were the product of anti-Canadian bias deliberately fomented by counsel for O'Keefe: "The transcript of the proceedings shows clearly and consistently that the quite ruthless and blatant working up of both racial and nationalistic prejudice, particularly against 'Canadians' (that term being used as a self-explanatory pejorative one), was the weapon by which

counsel for the plaintiffs was able to bring about the bizarre verdict of the jury." Jennings Op. at 4.[1] Sir Robert characterized the amount of the verdict and judgment as "astonishing" and "so bizarrely disproportionate as almost to defy belief." *Id.* at 13. Sir Robert summarized the trial as follows: "No reader of the transcript of the Mississippi trial could fail to understand that this whole episode was outrageous from beginning to end; and must be without doubt a breach of the minimum standard required both by international law and by the NAFTA treaty." *Id.* at 16.

9. At the request of counsel for Loewen, the Honorable Richard Neely, former Chief Justice of the West Virginia Supreme Court of Appeals, also reviewed the record of the *O'Keefe* litigation. Chief Justice Neely concluded that the Loewen defendants "were subjected to invidious discrimination because they were Canadians and were subjected to a complete denial of justice as that term is traditionally used in international law." Neely Aff. at 3.[2] Chief Justice Neely further explained that O'Keefe's lawyers had "reiterated three themes that had the effect of inflaming the passions of the jury, namely race, wealth, and Canadian citizenship," *id.* at 6, and that "when the regular invocation of these themes is combined with the way in which the trial judge handled the issue of punitive damages, it becomes apparent that Loewen was targeted for a plundering." *Id.* at 7. Chief Justice Neely concluded that "the case of *O'Keefe v. Loewen*, from beginning to end, descends to the level of a mockery of justice." *Id.* at 3.

10. At the request of counsel for Loewen, the Honorable Kirk Fordice, Governor of the State of Mississippi, has agreed to provide this Tribunal with his views of the *O'Keefe* litigation. Governor Fordice has concluded that the *O'Keefe* verdict "was tainted by xenophobic rhetoric that may have resulted in a violation of Loewen's due process rights" and that "the $500

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[1] A copy of Sir Robert's opinion is attached as Exhibit A.

[2] A copy of Chief Justice Neely's affidavit is attached as Exhibit B.

million verdict was shocking to me in light of the value of the underlying economic transaction." Fordice Let. at 1.[3] Governor Fordice has further concluded that the Missisippi Supreme Court's refusal to reduce the required bond "effectively denied Loewen a meaningful opportunity" for appellate review and left Loewen "without an effective remedy and with no reasonable alternative but to settle." *Id.* Governor Fordice summed up the litigation as follows: "The *O'Keefe* verdict represents to me everything that is wrong with the court system, and stands as a vivid example of the continuing need for tort reform. It concerns me that Loewen's status as a Canadian based company may have deprived it of fundamental rights that would otherwise be guaranteed to the citizens of our state. It appears to represent a denial of justice that I can assure you is otherwise contrary to the public policies of the great state of Mississippi." *Id.* at 1-2.

11. At the request of counsel for Loewen, Professor Andreas Lowenfeld of the New York University School of Law has agreed to provide this Tribunal with his views of the *O'Keefe* litigation. Professor Lowenfeld will provide an expert report and/or will testify that the *O'Keefe* verdict and the failure to waive the appeal bond requirements were a violation of NAFTA and international law because they were discriminatory, unfair and inequitable, a denial of both substantive and procedural justice, and tantamount to expropriation.[4]

12. For two separate reasons, the United States is responsible for the NAFTA breaches that occurred during the *O'Keefe* litigation. First, Article 105 of NAFTA requires the United States to ensure that its state governments comply with the terms of NAFTA. Article 105 codifies the established principle that, under international law, a federal government is responsible for the misconduct of its constituent states. The United States has recognized and affirmatively

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[3] A copy of Governor Fordice's letter is attached as Exhibit C.

[4] A summary of Professor Lowenfeld's opinion and Curriculum Vitae are attached as Exhibit D.

espoused this position for decades. Second, by tolerating the various NAFTA breaches that occurred during the *O'Keefe* litigation, the United States itself directly breached Article 1105 of NAFTA, which imposes affirmative duties on the United States to provide "full protection and security" to investments of foreign investors, including "full protection and security" against third-party misconduct.

13. These NAFTA breaches caused various harms to Loewen. Most obviously, they produced a discriminatory and grossly excessive $500 million verdict and judgment, foreclosed as a practical matter any possible appeal, and thus coerced a grossly excessive $175 million settlement. Moreover, the excessive verdict and coerced settlement in turn damaged Loewen's business reputation, reduced Loewen's prospects for growth and investment, and impaired Loewen's credit rating and ability to raise money. Loewen suffered these various harms beginning on November 1, 1995, the date of the initial verdict. The Mississippi litigation represented, for the worst, a defining moment for Loewen, which continues to suffer these and other harms to this day.

14. The NAFTA breaches in the *O'Keefe* litigation also caused various harms to Raymond Loewen both individually and as a shareholder of TLGI. Between October 31, 1995, one day before the initial verdict, and January 29, 1996, immediately after the settlement was announced, the value of Mr. Loewen's shares of TLGI plummeted from C$53¾ to C$39. Moreover, Mr. Loewen suffered grave damage to his reputation beginning on November 1, 1995 and continuing to this day.

II. PARTIES TO THIS ARBITRATION

15. Claimant The Loewen Group, Inc. ("TLGI") is a publicly traded corporation organized under the laws of British Columbia, Canada; it is a national of Canada and no other nation. The principal operating subsidiary of TLGI is Loewen Group International, Inc. ("LGII"), a corporation organized under the laws of Delaware, United States of America. TLGI owns 85% of the shares of LGII and directly controls LGII, which in turn owns and controls various lower-tier United States subsidiaries. TLGI's address is 4126 Norland Avenue, Burnaby, British Columbia, Canada, V5G 3S8.

16. Claimant Raymond L. Loewen is a national of Canada and of no other nation. Mr. Loewen presently serves as co-Chairman of the Board of TLGI and as Director of LGII. When this claim arose, he was Chairman and Chief Executive Officer of both companies. At all times between then and now, Mr. Loewen has held a substantial percentage of the publicly traded shares of TLGI. Mr. Loewen's address is 4126 Norland Avenue, Burnaby, British Columbia, Canada, V5G 3S8.

17. Respondent The United States of America is a signatory to NAFTA. For purposes of disputes arising under NAFTA, the United States' address is c/o Robert J. McCannell, Esq., Executive Director, Office of the Legal Advisor, Suite 519, Department of State, 2201 C Street, N.W., Washington, D.C. 20520. *See* 58 Fed. Reg. 68,457 (1993) (copy attached at Exhibit G).

18. The relevant provisions embodying the agreement of the parties to refer this dispute to arbitration and regarding the number of arbitrators and their method of appointment may be found in Articles 1122 *et seq.* of NAFTA and in the Consent to Arbitration and Waiver of Other Dispute Settlement Procedures, filed contemporaneously herewith.

19. The date of approval by the Secretary-General of ICSID, pursuant to Article 4 of the Additional Facility Rules, of the agreement of the parties providing for access to the Additional Facility, will be supplied at a later date.

20. On July 29, 1998, TLGI and Raymond Loewen notified the United States of their intention to submit this claim to arbitration, as required by Article 1119 of NAFTA.

21. By letter dated September 25, 1998 (copy attached at Exhibit G), TLGI and Mr. Loewen offered to consult or negotiate about this claim, as suggested by Article 1118 of NAFTA. In mid-October, 1998, the United States agreed to meet with counsel for Loewen. On October 22, 1998, counsel for the parties met and consulted, but that meeting did not result in a settlement.

III. FACTS

A. The Commercial Disputes Between O'Keefe And Loewen

22. The O'Keefe family has owned funeral homes in Mississippi since the latter half of the 19th century. (Trial Transcript (hereinafter "Tr.") at 2010)[5] The O'Keefe family also has long owned Mississippi funeral insurance companies, including Gulf National Life Insurance Company. (Tr. at 416-422) In 1974, 1979, and 1987, Gulf National entered into contracts to conduct business in conjunction with the Wright & Ferguson Funeral Home. According to O'Keefe's own trial witnesses, the total value of these three contracts to O'Keefe, at the time of the litigation, was $980,000. (Tr. at 2367)

23. In 1990, Loewen made significant investments in Mississippi. LGII purchased 90% of the stock of Riemann Holdings, Inc., O'Keefe's principal and long-time competitor in the Mississippi funeral services and insurance industries. (Tr. at 94-95; Appendix (hereinafter

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[5] A copy of the trial transcript from the *O'Keefe* litigation is being filed together with this Notice of Claim.

"App.") at A60, A62-63)[6] Riemann Holdings in turn acquired Wright & Ferguson Funeral Home (Tr. at 3061; App. at A63), which began to do business not only with Gulf National, but also with competing insurance companies owned by Loewen. (Tr. at 93, 3049-51)

24. In response to this new foreign investment, O'Keefe began a bigoted advertising campaign against Loewen. In January 1990, O'Keefe distributed to potential customers a direct-mail advertisement criticizing Loewen for its Canadian ownership — a theme that would later play a prominent role at the trial:

> By now, you probably received a letter from David Riemann outlining their sale to a foreign company. . . . Loewen Group has not come in as a partner. . . . The majority of the board of directors are Canadian. . . . Obviously, prices are raised and profits go out of the U.S.A.

(Tr. at 96-97) In July 1990, O'Keefe distributed a more strident direct-mail advertisement:

> Sometimes it seems America is being sold off piece by piece. The Rockefeller Plaza, Columbia Pictures, now, Riemann Funeral Home. . . . Recently, Riemann Funeral Homes sold out controlling interest to a chain in Canada. Furthermore, the acquiring company is largely funded from sources outside the United States. This has led some people to wonder who is still locally-owned and operated, thereby supporting the local community. . . . This year we're coming to celebrate our 125th anniversary. What does that mean to you? It means a commitment from us to remain as one of Coast's locally owned and operated funeral homes, a commitment to the local constituents. . . . We keep our money in south Mississippi . . . . Let me assure you after 125 years of service, we're here to stay. Since [my great] grandfather founded Bradford-O'Keefe in 1865, we've done everything we can to meet the needs of south Mississippi, both personally and professionally.

(Tr. at 98-99, 2689-91) Finally, on December 7, 1990, O'Keefe distributed a direct-mail advertisement analogizing Loewen's competition against him to the Japanese "sneak attack" on Pearl Harbor — an analogy that would also reappear at trial:

> The Japanese killed 3,451 Americans in that sneak attack on Pearl Harbor, December 7, 1941. . . . Millions of young Americans responded to the country's need and Jerry O'Keefe was among those distinguished himself in the U.S. Marines

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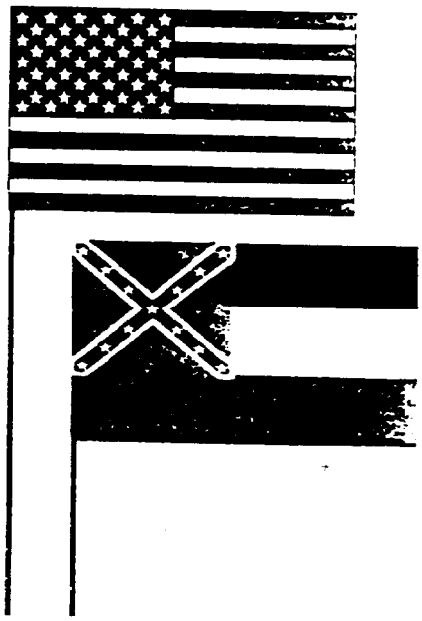
[6] Materials relevant to the *O'Keefe* case (other than the trial transcript) are being filed in an appendix to this Notice of Claim; all citations are to the Appendix page numbers.

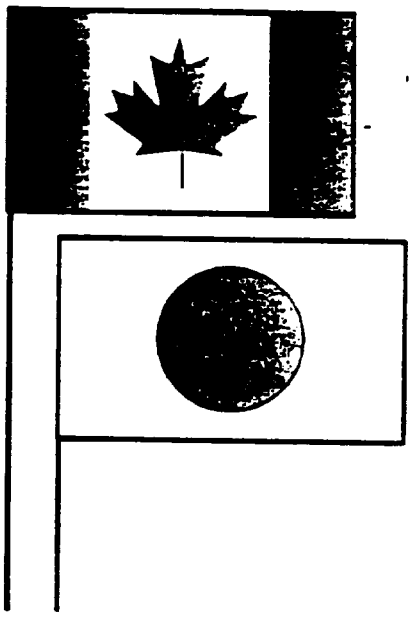
> and was awarded the Navy Cross, our countr[y's] highest award. . . . To remain free and at liberty were among the strongest goals of the people. Freedom allowed Riemann to sell their funeral homes to a foreign firm. Riemann is now owned by a Canadian firm, financed over [$]25 million from a Hong Kong bank. Freedom to sell to anyone is a right in this country, but freedom also carries with it responsibility of the truth. . . . Riemann borrowed some money from the Shanghai Bank.

(Tr. at 104-05, 2694-96) That advertisement was deceptive as well as xenophobic, because there were no Asian investors associated with Loewen's Mississippi investment and because the "Shanghai Bank" was in fact located in Seattle, Washington. (Tr. at 2678, 2698)

25. O'Keefe's advertising campaign also included billboards decrying foreign competition. For example, one of those billboards displayed the United States, Mississippi, Canadian, and Japanese flags and asked, "'Does the business you patronize keep your money in the local economy?'" (Tr. at 4421) Under the U.S. and Mississippi flags was the word "Yes"; under the Canadian and Japanese flags was a large "No." (Tr. at 4421-22) A copy of that advertisement appears on the following page.

DOES THE BUSINESS YOU PATRONIZE KEEP YOUR MONEY IN THE LOCAL ECONOMY?





YES.

O'BRYANT-O'KEEFE
FUNERAL HOME

BRADFORD-O'KEEFE
FUNERAL HOME, INC.

NO.

LOWEN COMPANY

RIEMANN HOLDING COMPANY

HOLDER-WELLS

O'BRYANT-O'KEEFE AND BRADFORD-O'KEEFE.....

RIEMANN FUNERAL HOMES.....

O'BRYANT-O'KEEFE
FUNERAL HOME

26. O'Keefe's advertising campaign generated widespread anti-Canadian sentiment, including local newspaper articles and a letter to Loewen from the Mississippi Attorney General's Consumer Protection Office, which complained that Loewen had not publicized the Canadian nature of its ownership of Riemann Holdings. (Tr. at 4471-73) Loewen responded to the letter in detail and complained itself about O'Keefe's xenophobic advertisements. (Tr. at 4473-80, 4483-87) The Attorney General's office took no further action on either letter. (Tr. at 4480, 4487)

27. While O'Keefe was publicly railing against Canadian investment, he himself was attempting to sell funeral homes and insurance companies to Loewen. (App. at A63) Negotiations stalled because Loewen was interested in buying only funeral homes, but O'Keefe insisted on packaging his insurance companies, which were then experiencing financial difficulty, with his funeral homes. (Tr. at 106, 1329-49)

28. On April 24, 1991, O'Keefe filed a lawsuit against Loewen alleging breaches of the 1974, 1979, and 1987 contracts between Gulf National and Wright & Ferguson. (App. at A20-23) Despite the lawsuit, Loewen continued to negotiate with O'Keefe.

29. On August 19, 1991, O'Keefe and Loewen signed an agreement containing five principal elements. *First*, O'Keefe would dismiss his pending lawsuit against Loewen. (App. at A632, A661; Tr. at 320) *Second*, O'Keefe would sell Loewen two funeral homes worth between $2 and $2.5 million. (App. at A68, A603-05) *Third*, Loewen would sell O'Keefe an insurance company and trust fund worth between $3.3 and $4 million. (App. at A73-74, A598-601; Tr. at 677) *Fourth*, O'Keefe would assign to Riemann Holdings an option, valued at $19,500, to purchase a Jackson, Mississippi cemetery tract. (App. at A607-08; Tr. at 227) *Fifth*, O'Keefe would become the exclusive provider of certain insurance policies sold through Loewen funeral homes. (App. at A601-03)

30. The 1991 agreement left open a number of critical issues, including (i) the selling prices for the funeral homes and the insurance company, (ii) the terms of the exclusive insurance provider relationship, and (iii) the details regarding how the insurance trust fund would be valued and held. (App. at A71-74) The parties subsequently disputed whether, in light of these various open terms, the 1991 agreement was a binding and enforceable contract. The parties further disputed whether the agreement could be binding and enforceable without prior approval from the Mississippi Insurance Commissioner. (Tr. at 117-19; App. at A74, A81, A670, A689)

31. The 1991 agreement required all transactions to close within 120 days (*i.e.*, by December 17, 1991), "provided all documentation has been provided, all valuations determined, and all requirements met." (App. at A75-76, A630-31) The parties never agreed, however, on the valuations of the funeral homes and the insurance company. For the funeral homes, O'Keefe asked for approximately $2.5 million, and Loewen offered $2 million. (Tr. at 664-65) For the insurance company, O'Keefe offered approximately $3.3 million, but Loewen asked for $4 million. (Tr. at 675-78)

32. In February 1992, the FBI seized the Mississippi Insurance Commissioner's records concerning O'Keefe's insurance companies. (App. at A239-40) When Loewen expressed concern about the O'Keefe companies' financial security (Tr. at 247-48, 250, 359), O'Keefe represented to Loewen that the target of the investigation was the Mississippi Insurance Commissioner, not O'Keefe, and that its insurance companies were financially secure. (App. at A240-41; Tr. at 2089-90, 2301)

33. In April 1992, after the parties failed to agree on the open terms (App. at A87), O'Keefe filed an amended complaint alleging breach of the 1991 agreement and, for the first time,

common-law fraud and violations of state antitrust law. (App. at A88, A225) That complaint sought actual damages of $5 million. (App. at A33)

34. In May 1992, the Mississippi Insurance Commissioner placed Gulf National under administrative supervision, the insurance equivalent of bankruptcy. (App. at A56) Subsequently, O'Keefe expanded his complaint to include claims for various consequential damages allegedly suffered as a result of the administrative supervision. (App. at A160-66, A227-28, A677-78; Tr. at 71-74, 523-24, 527-29) O'Keefe later testified, however, that the administrative supervision was a "big mistake" (Tr. at 2119-22), and was thus obviously not foreseeable to others.

B. The Mississippi Court Proceedings

35. The trial took place in the in the Circuit Court for the First Judicial District of Hinds County, Mississippi, a court created by the State of Mississippi, Miss. Code § 9-7-3(1). The presiding judge, the plaintiffs' lead trial counsel, and eight of the twelve jurors were black. A number of prominent local black citizens and ministers attended the trial and were conspicuous in their support of O'Keefe. (App. at A741-42)

36. The presiding judge was James Graves, one of four elected judges who comprise the Circuit Court for Hinds County, Mississippi. Under United States law, the voting districts of that court are drawn to guarantee the election of two white judges and two black judges. *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). Judge Graves' political constituency is thus predominately black.

37. O'Keefe named as defendants not only TLGI and LGII, but also local Mississippi corporations owned by Loewen, such as Wright & Ferguson Funeral Home. By naming such Mississippi defendants, O'Keefe made it impossible for Loewen to remove the case to federal

court, where all judges are appointed and have life tenure, and are thus not beholden to any particular local constituency.

38. O'Keefe's lead trial lawyer was Willie Gary, a flamboyant plaintiffs' lawyer from Florida. I. Portsmouth, *The Trial of Ray Loewen*, PROFIT—Toronto, Feb. 1996, at 24; P. Moore, *Mississippi Jury Awards Gary Client $500 Million*, Palm Beach Post, Nov. 7, 1995, at 1B. Gary belongs to the "Million Dollar Verdict Club" and the "Golden Legal Eagles," clubs whose members refuse cases alleging less than $100 million in damages. Y. Samuel, *Florida Attorney to Receive State King Award*, St. Louis Post-Dispatch, Jan. 8, 1998, at B1. Gary has appeared on *Lifestyles of the Rich and Famous*, flies in a personal jet named the "Wings of Justice," and has described the *O'Keefe* litigation as "The Civil Trial of the Century." Portsmouth, *supra;* B. Harris, *From Migrant Shack to Posh Mansion*, Jackson Advocate, Nov. 16-22, 1995, at B1, C6; *Winning Words: Willie E. Gary's Voir Dire, Opening Statement and Closing Argument in the Civil Trial of the Century* (App. at A519).

39. Gary made several improper public statements during the trial. Although the court had instructed the attorneys not to make public statements about the case (Tr. at 1123), Gary told the congregation of a local black church that "his prayers would be answered by a $600 million or greater verdict." (App. at A741) On other occasions, Gary spoke on a radio talk show popular with the local black community. (App. at A742) Throughout all of this, the jury was not sequestered. (App. at A741)

40. During the seven-week trial, Judge Graves repeatedly allowed Gary to make irrelevant and highly prejudicial comments, and to elicit from witnesses irrelevant and highly prejudicial testimony, about the nationality, race and economic class of the parties in this case.

Those comments and testimony inflamed the passion of the jury, and ultimately produced a grossly excessive verdict.

1. Voir Dire

41. During voir dire, counsel screen prospective jurors for biases that might prevent them from fairly considering the evidence. If a juror displays such bias, the court must excuse him or her "for cause." If the court declines to excuse a juror "for cause," a party may exercise one of its limited number of "peremptory" challenges to excuse a prospective juror without stating a reason.

42. Gary introduced himself to the prospective jurors by focusing on irrelevant but inflammatory themes, such as O'Keefe's local roots: "We teamed up with our good friends . . . to represent one of your own, Jerry O'Keefe." (App. at A328) Gary continued with questions about issues such as patriotism and willingness to fight for the United States: "And y'all believe what it [the jury system] stands for in America?" "[H]ow many [of you] have serve[d] in the military?" (App. at A330) Later in the voir dire process, Gary explained: "Y'all remember when I asked the questions about the men and women that have been off to war and fought for their countries or been in the services? The reason why I did that was because I think jury service is up there close, maybe second to going off to war or going in the armed service. It is an important service, and that's why I asked that question." (App. at A380)

43. Gary pointedly asked whether foreigners "from Canada" should be bound by "Mississippi" rules: "Now, let me ask you this question: The Loewen Group, Ray Loewen, Ray Loewen is not here today. The Loewen Group is from Canada. Do you think that every person should be responsible and should step up to the plate and face their own actions? . . . . Let me see a show of hands if you feel that everybody in America should have the responsibility to do that.

Let me just say this: . . . that group is from Canada . . . . Just because the group is from Canada, you still have to give them a fair trial. Do you all agree to do that? I want to make that clear, but will you also agree that if they come down to Mississippi to do business in Mississippi, they've got to play by the same rules. Y'all agree to that?" (App. at A356) Loewen's counsel objected to these statements, but Judge Graves overruled the objection. (App. at A357)

44. Gary continued to stress Loewen's nationality: "[I]f we prove conspiracy to cheat, bad faith by Ray Loewen and his group from Canada, . . . do you have any problems with bringing damages against Ray Loewen and his group?" (App. at A357) As a further reminder, Gary asked, "Did you know Ray Loewen and his group out of Canada, The Loewen Group" (App. at A373) and later "Do any of you know anything about the case? Anybody knows anything about this case, the O'Keefe family suing The Loewen Group out of Canada . . . . ?" (App. at A383)

45. Gary also invited the jury to award large punitive damages because Loewen is a big corporation: "Have any of you ever heard of a situation where, like in the NBA, NFL, players got in, they didn't follow the rules, and they got fined for it? . . . . They got punished, in other words. They're making these big salaries, and they hit them with it, right? . . . . But, if the judge allows you to consider the issue of punitive damages and he told you that you — one of the things you do is you consider the net worth of the person could all of you do that . . . ?" (App. at A363-64); "[T]he fine should fit the situation, should fit the situation. Whereas you have a big company, if you awarded punitive damages, and you just slap them on the wrist, that ain't going to stop them, right? Y'all understand?" (App. at A364)

46. Gary next alleged that Loewen's trade practices took advantage of families "here in Mississippi" and suggested that Loewen was "guilty" of a crime: "Members of the jury, would you allow room in your minds for me while we're proving this case to show you that not only did

Ray Loewen and his group do these kind of things . . . here in Mississippi, but it was a practice for them, the way they did business . . . would you allow me to prove that to you, too? Would all of you do that, show you that not only did they do that here in Mississippi, but it's a way of doing business with them. . . . . Let's go a step further the same thing . . . if the evidence showed that Ray Loewen and his group tried to cheat the O'Keefe family, could you find them guilty?" (App. at A364)

47. Gary alleged that Loewen had come "down" from Canada to deceive Mississippi families: "Now, if we prove to you . . . that The Loewen Group came down to Mississippi, buying up small family business funeral homes, leaving their names on them, the family name, 150 years of tradition, sometime 100 years or whatever, and they used deceptive advertising, that is we're going to say you own it, but you really don't, and if they do that, gain trust to raise prices on the people, loved ones being buried . . . ." (App. at A367)

48. In the presence of the other prospective jurors, Gary had the following dialogue with a prospective juror about the Canadian ownership of Wright & Ferguson, which operated a funeral home near the courthouse:

> MR. GARY: [Y]ou were under the impression that that was a business owned by Wright & Ferguson?
> MS. DICKERSON: Yes.
> MR. GARY: That's what you were led to believe?
> MS. DICKERSON: It's Wright & Ferguson Funeral Home. That's the name of it.
> MR. GARY: Did you know Ray Loewen and his group out of Canada, The Loewen Group?
> MS. DICKERSON: No.
> MR. GARY: The ones that really own it and not —

Loewen's counsel objected, but Judge Graves overruled the objection. (App. at A373)

49. Despite the fact that O'Keefe had sued Wright & Ferguson, Gary stressed to the jurors that O'Keefe "had no beef with Mr. Wright," a Mississippi resident who had formerly

owned Wright & Ferguson and was known as a leading local businessman by some of the prospective jurors. (App. at A371) During his opening and closing arguments, Gary reiterated that he had "no beef" with Mr. Wright (Tr. at 56) and that Mr. Wright was "really not in" the case (Tr. at 5709). Indeed, Gary went to great lengths to assure one prospective juror that "just because the Wright name is on [the case], you understand, *we're suing The Loewen Group*." (App. at A371) (emphasis added)

50. Two prospective jurors were excused for reasons directly relating to Loewen's Canadian status. One juror stated that she did not "think that a foreign corporation could be given a fair trial here." (App. at A487) Another juror stated that a foreign company should not be given a fair trial "'because of special tax breaks that foreign corporations receive.'" (App. at A488) Despite that explicit statement of bias, Judge Graves refused to excuse the latter juror for cause. (App. at A495-96) Accordingly, Loewen was forced to use one of its limited peremptory challenges to have him removed. (App. at A490-91)

51. From the outset, Gary emphasized to the prospective jurors the huge damages he would ultimately be seeking: "[In] [t]his case, there will be claims as high as $650 million to $850 million dollars. I want you to look me in the face and tell me now if that's going to bother anybody here." (App. at A337)

2. O'Keefe's Opening Statements

52. O'Keefe's opening statements sounded the themes that would resonate throughout the trial — nationality (Mississippians and Americans versus Canadians), race (Loewen was a racist company), and economic status (small local company versus giant multinational conglomerate).

53. Two O'Keefe lawyers, Michael Allred and Willie Gary, gave opening statements. Allred began by invoking racial issues, telling the jury that he attended a local church "in which a lot of black and white people go to church together because they like to do that. It's often the case that black and white people in Mississippi choose to worship in different styles and different churches. Funeral business is something like that as well. . . . [T]hese businesses that Loewen bought were those that served primarily the white community." (Tr. at 16)

54. Allred then emphasized Loewen's Canadian nationality. Three times, he repeated that O'Keefe had gone to Vancouver to do business with Loewen. Allred said, "Mr. O'Keefe was invited to come to Vancouver, and you are going to see evidence of that trip to Vancouver. At the trip in Vancouver . . . ." (Tr. at 20) Allred noted that the Riemanns also went to Vancouver to discuss business with Loewen. (Tr. at 30) Allred also remarked that negotiations over the 1991 agreement occurred when John Turner, a Loewen official, "came to Jackson, Mississippi." (Tr. at 22) Allred further stated that another Loewen employee "came to Jackson, Mississippi" to investigate possible acquisitions. (Tr. at 24-25)

55. Allred closed by stressing nationality and class, encouraging the jury to exercise the "power of the people of Mississippi . . . to say no to people like Loewen who would build rich fortunes upon the misery and poverty of burying loved ones of the people of the poorest state in our nation." (Tr. at 42)

56. Willie Gary's opening statement for O'Keefe struck the same three themes, but he focused primarily on nationality. He began by emphasizing O'Keefe's Mississippi roots and contrasting them to Loewen's Canadian ownership: "[I]n order for you to understand what this case is about, you need to know the man [Jerry O'Keefe]. And my daddy used to say in order to know . . . where you're going, you need to know from whence you come." (Tr. at 49) Gary

went on to emphasize O'Keefe's long-standing Mississippi pedigree, contrasting it with Loewen's recent arrival in the state: "[T]he O'Keefe family just didn't start in Mississippi in 1990 like Ray Loewen did. He started with his great grandfather some 130 years ago . . . in Ocean Springs, Mississippi" (Tr. at 49).

57. Gary drew distinctions between O'Keefe's "American" citizenship and Loewen's Canadian ownership, replete with references to Loewen "coming down to" or "descending on" Mississippi. Gary repeatedly called O'Keefe a "fighter" for "our country" (Tr. at 50, 54) and an "American hero" (Tr. at 50) Gary explained how Loewen "decided to come to Mississippi and put [O'Keefe and his family] . . . out of business." (Tr. at 54) Gary told the jury that Loewen "came down here" (Tr. at 61) and "descended on the State of Mississippi" (Tr. at 58).

58. Gary exploited the letter to Loewen from the Attorney General's Consumer Protection Office to further stress Loewen's Canadian nationality. Gary said, "[Y]'all see the seal up there [on the wall behind the judge's bench in the courtroom]. That's the State of Mississippi. That's the State of Mississippi, the State of Mississippi said now . . . to their [Loewen's] lawyer. Y'all see that, The Loewen Group up in Canada, and it [the letter] says to them . . . ." (Tr. at 61) The letter in question discussed an article in a Biloxi newspaper that, according to Gary, "centers around the issue of funeral home ownership, local versus foreign. Ain't no problem with you [foreigner] owning it. . . . [B]ut they say, 'Look, if you're going to do that, while foreign or natural [sic] — ownership of a local funeral home is certainly permissible, such foreign or national entities cannot represent to the consumers of a given area that they are locally owned.'" (Tr. at 62)

59. Gary described how Loewen and O'Keefe had negotiated the 1991 agreement "at Canada" after O'Keefe had threatened to sue Loewen in "the American way" of resolving

disputes. According to Gary, Loewen "had him [O'Keefe] come up at [sic] Canada after he told them that if they didn't respond he was going to have to sue them, the American way, and they [Loewen] said, 'You come up to Canada, and we'll sit down and talk it over,' and then . . . no sooner than they got to Canada, no sooner than they got up there," Loewen offered to purchase some of O'Keefe's funeral homes. (Tr. at 63) Gary repeated for a fourth time that O'Keefe went to Canada, but returned "home" to Mississippi to file this lawsuit: "[N]ow, Jerry went back home. Jerry went back home, and he decided [sic] couldn't take anymore. . . . Now, he filed a lawsuit here in this court, in this town . . . ." (Tr. at 65) Gary again asserted that O'Keefe's decision to file a lawsuit was "the American way." (Tr. at 65) Gary then described Turner's visit to Mississippi to negotiate the 1991 Agreement: Turner "came down to Mississippi. Jerry was down there tending to his own business, going along with his lawsuit, the American way. They [Loewen] said, 'Well, wait a minute. We want to try to make a deal with you.' . . . They came down here and made a settlement." (Tr. at 65-66)

60. Gary concluded his opening statement by appealing to the jury's Mississippi allegiances:

> Members of the jury, when it's all said and done, hear all the evidence in this case, there's no doubt in my mind you, too, will know that you can say with your verdict to Ray Loewen, "no more, not in the State of Mississippi and hopefully nowhere else, but no more. It's not right. You can't do that and come up with smoke screens, smoke screens, to try to get out of it."

(Tr. at 78)

3. Testimony of Significant Witnesses

61. In all, 40 witnesses testified at trial. For most of the significant witnesses, Gary elicited testimony or asked questions reiterating his principal themes of nationality, race, and class.

a. John Turner

62. O'Keefe called John Turner, who had worked as a senior Loewen executive for approximately two years. (Tr. at 197-98) Gary asked, "[D]id Ray Loewen . . . send you down to Mississippi to settle the lawsuit with Jerry O'Keefe?" After Turner answered yes, Gary continued to focus on the location of the meeting, twice again asking about "when you came down to Mississippi" and "did you come to Mississippi?" (Tr. at 212) Gary emphasized the Canadian location of an earlier meeting between Loewen and O'Keefe: "In other words, so one of the things that you discussed when he was — when he came to Canada was to try to resolve the controversy?" (Tr. at 213) Gary summarized the meeting locations yet again: "[S]o obviously the case didn't get settled when he came to Canada to try to get it done, but then the second meeting was when you came down here to Mississippi to meet with him?" (Tr. at 214)

b. Mike Espy

63. O'Keefe called Mike Espy, a prominent local black politician, to give wholly irrelevant testimony that O'Keefe (who is white) is not a racist. Espy had been U.S. Secretary of Agriculture in 1993 and 1994 until he was investigated (and later indicted) for campaign finance violations. Espy stressed that he had grown up in Mississippi (Tr. at 1083) and that his first legal job was in Jackson with Central Mississippi Legal Services, which Espy described as "right down the street, Pascagoula Street here." (Tr. at 1084)

64. Gary invited Espy to discuss O'Keefe's attitudes about race: "[As] an African-American in Mississippi trying to go out and be the best that you could be to represent your people or what have you, what did Jerry bring to the table that inspired you from that respect?" (Tr. at 1096) In response, Espy endorsed O'Keefe's character as not racist: "as an African-American, personally, . . . you run [for office] against people with attitudes and certain biases that

they have, and I can say that he [O'Keefe] didn't exhibit any bias towards a person of a different race. He dealt with me as a person, no matter what color I am. He dealt with me based on policies, and I can certainly say he is a man without bias and without prejudice . . . ." (Tr. at 1096)

65. On cross-examination, Loewen's counsel asked Espy if an anti-Canadian advertising campaign would be consistent with NAFTA. (Tr. at 1101) Espy responded with a diatribe about the allegedly unfair trade practices of Canadian wheat farmers, and the need to "protect the American market": "[W]e believe in free enterprise. We believe in the free flow of goods between countries, but it was also consistent with what I did as [U.S.] secretary [of Agriculture] to make sure no one took advantage of the American people. In that respect, I was very involved in certain actions which restricted Canadian products into our market because they tried to undervalue, particularly . . . we thought that their wheat, the Canadian wheat was underpriced. They would come in and flood our markets. Our people eat a lot of pasta, and they would not buy the American wheat. They would go for the cheaper wheat which was underpriced to take over the market, and then — then they would jack up the price, and that was not right consistent with what I've done in my life, try to protect people, protect the American market." (Tr. at 1101-02)

66. On redirect, Gary asked Espy about the letter — bearing "the seal of the State of Mississippi" (Tr. 1105) — that the Mississippi Attorney General's Consumer Protection Office had written to Loewen. Gary asked Espy to read this letter to the jury again. For the second time, the jury heard its irrelevant and prejudicial discussion of "the issue of funeral home ownership local versus foreign." (Tr. at 1107)

67. Gary also suggested that Canadians and Mexicans would not be true to their word under NAFTA. Gary asked Espy: "[NAFTA] didn't mean that because you were from Canada or from Mexico or from any other country that you could sign it and have no intentions of living up to it, did it?" (Tr. at 1109-10) Espy answered, "True." (Tr. at 1110)

c. Earl Banks

68. Gary called Earl Banks, a black state legislator and Jackson funeral home operator, to give further irrelevant testimony that O'Keefe is not a racist. Banks stressed that he had lived in Jackson his whole life (Tr. at 1110-12), that he received a law degree from the Mississippi College School of Law (Tr. at 1111), that he represents the local district in the Mississippi legislature (Tr. at 1111-12), and that his business was "celebrating 70 years of service here in the City of Jackson" (Tr. at 1112).

69. Banks described how the funeral industry in general was racially segregated (Tr. at 1116-17, 1138-41), but stressed O'Keefe's "unusual" willingness to pursue a partnership with Banks' black funeral home to "sel[l] preinsurance in the Afro-American market." (Tr. 1118) Banks testified that O'Keefe "did not have to come to us" but did so anyway. (Tr. 1118-19)

d. Jerry O'Keefe

70. Jerry O'Keefe began his testimony by stressing his long-standing local roots. He told the jury that he was from Biloxi, Mississippi and had grown up in Ocean Springs, Mississippi. (Tr. at 1996-97) O'Keefe also stated that his family had been "serving families in Ocean Springs, Biloxi area for 130 years ." (Tr. at 2010; *see also* Tr. at 1998) O'Keefe further testified that his son would be the "fifth generation in this business," which has "been in the family so many years." (Tr. at 2000)

71. Gary elicited irrelevant testimony that presented O'Keefe as a dedicated American patriot:

> MR. O'KEEFE: Well, I had just finished high school in 1941, and of course, the Japanese bombed Pearl Harbor in December of 1941 on Sunday, and I went down to try to get in the service the next day.
> . . . .
> MR. GARY: And did they call you by way of the draft to come in and serve your country?
> MR. O'KEEFE: No . . . I volunteered my services.
> MR. GARY: You wanted to serve your country?
> MR. O'KEEFE: Yes, sir, certainly did.
> . . . .
> MR. GARY: And so now the next day after our country had been bombed by Pearl Harbor [sic], here you are standing before the service department wanting to volunteer your services?
> MR. O'KEEFE: Yes, sir.

(Tr. at 2004-06) Gary questioned O'Keefe in detail about honors "for the service that [he] gave [his] country in World War II." (Tr. at 2007)

72. O'Keefe also characterized himself as someone who protected the interests of black as well as white Mississippians. For example, he described how, when he was being pressed to sell Gulf National, he tried to protect the interests of "small funeral homes, both white and black owned, all over the state of Mississippi." (Tr. at 2111)

73. Once Gary had established O'Keefe's local ties and patriotism, he contrasted those characteristics with Loewen's Canadian nationality and recent investments in Mississippi. For example, O'Keefe testified that his contractual arrangement with Wright & Ferguson "went along very well for many, many years until Loewen came to town." (Tr. at 2022)

74. Gary also prompted O'Keefe to question Loewen's credibility and to endorse the Wright family based on how long each had been in the community:

> MR. GARY: [H]ow long have you known Mr. John Wright over here?

MR. O'KEEFE: Well, I've known Mr. Wright ever since I . . . became active in the funeral home business, and so that's many, many years, 45 years, I guess, 48 years.
MR. GARY: And he's been around all that time, right?
MR. O'KEEFE: Yes, sir, he surely has.
MR. GARY: Through thick and thin, ups and downs, ins and outs and all of that?
MR. O'KEEFE: Yes, [the Wrights] have a proud tradition of funeral service here in the Jackson area.
MR. GARY: How long have Ray Loewen and his group been in the state and in this town?
MR. O'KEEFE: Well, they've been in this state about four or five years, five years, I guess.
MR. GARY: And when they first set foot in the state, when they first came to town . . . .

(Tr. at 2025-26)

75. Throughout O'Keefe's testimony, Gary repeatedly emphasized Loewen's Canadian nationality. He asked O'Keefe, "What would be the relationship of the time that you transacted with Mr. Wright & Ferguson [sic] to do the trust rollover and the time that they sold out to The Loewen Group out of Canada?" (Tr. at 2034) Gary similarly characterized the purchase of Riemann Holdings in this fashion: "The Loewen Group came down from Canada and took over the Riemanns . . . ." (Tr. at 2039) On redirect, after Gary asked O'Keefe "who owned Riemann Holdings," O'Keefe answered, "The Loewen Group out of Canada." (Tr. at 2352) O'Keefe described the start of negotiations with Loewen: "[W]e traveled to Canada . . . to see if we couldn't work out something with the Loewen people, because there's room for everybody to live and work in Mississippi . . . ." (Tr. at 2043)

76. To reiterate Loewen's Canadian nationality, Gary asked O'Keefe the following consecutive questions: "Now, obviously, you didn't reach a settlement agreement when you went up to Canada; is that correct?" "How many times did you go to Canada?" "Now, when you went to Canada, did you go there to try to resolve this matter?" (Tr. at 2047) A short while later, Gary asked O'Keefe, yet again, "Now, you didn't resolve the issue or settle the Wright &

Ferguson matter in Canada; is that correct?" (Tr. at 2048) Two questions later, Gary said again, "Now, . . . you didn't resolve it in Canada." (Tr. at 2049) O'Keefe answered: "Ray Loewen called me and wanted me to come back up to Canada . . . and I said, 'No, . . . I've already gone to Canada at substantial expense to myself . . . .'" (Tr. at 2050) Later in O'Keefe's testimony, Gary asked, "[T]hrough any efforts of your own . . . did you ever purport to go to Canada and get with Ray Loewen to sell out the business on the Coast?" (Tr. at 2108)

77. Gary also prompted O'Keefe to explain how his business was family-run, contrasting that with Loewen's larger size:

> MR. GARY: Now, let's go back a little bit. Let's talk about Jerry O'Keefe. How did you learn the funeral home business?
> MR. O'KEEFE: Well, I kind of grew up in the business. Of course, you start learning by unfolding chairs and carrying the flowers around, and I was about 10 or 11, 12 years old and just going along and doing what had to be done . . . .
> MR. GARY: So you worked with your father?
> MR. O'KEEFE: Yes, sir.
> MR. GARY: And what about your sons?
> MR. O'KEEFE: Well, my son, Jeff, who's over here, is — he's really the fifth generation in this business.
> MR. GARY: Raise your hand, Jeff.

(Tr. at 1999-2000) O'Keefe went on to say that his funeral homes have "been in the family so many years, and we're proud to see that, really." (Tr. at 2000)

78. Gary then turned to the irrelevant theme of Mr. Loewen's personal wealth. Initially, Gary asked O'Keefe "what type of person was Ray Loewen," adding parenthetically that "it's been said that most people don't get a chance to talk to him or he is a big man." (Tr. at 2047-48) Although Loewen's counsel successfully objected to this gratuitous remark, the jury nonetheless heard it, and Judge Graves gave no cautionary instruction about it. Gary then asked O'Keefe whether he had "g[otten] a chance to observe" Mr. Loewen. O'Keefe answered "Oh, yes, yes, we — he took us out on his yacht, and I believe his company pays him about a million

dollars a year to keep that yacht up and helicopter and other amenities that he's able to use." (Tr. at 2048) Gary prompted, "Did you observe him having people cater to him?" O'Keefe answered, "Oh, yes, yes, we was [sic] served dinner on the yacht that night, and we had a young lady there who was helping mix the drinks and serving, and she took occasion to light his cigar when he needed his cigar lit." (Tr. at 2048)

e. David Riemann

79. Loewen called David Riemann to address the transaction between Riemann Holdings and Loewen. (Tr. at 2674)

80. On cross-examination, another of O'Keefe's counsel, Lorenzo Williams, repeatedly called attention to Loewen's Canadian nationality. Williams asked, "Riemann Holdings is owned by Loewen Group and Ray Loewen out of Vancouver, Canada; is that correct?" (Tr. at 2831-32) Williams then asked Riemann: "You didn't see the [1991] agreement until you had to go up to Vancouver, Canada, to discuss this; is that correct?" (Tr. at 2838) Williams' next question was, "[Y]our partners and shareholder, Ray Loewen and The Loewen Group, signed away your rights under this agreement that prompted you to have to go to Vancouver, Canada . . . ; is that correct?" (Tr. at 2833) Williams asked Riemann: "[Y]ou was [sic] complaining to Ray Loewen that the Wrights was [sic] able to avoid discussing their problem with the regional manager and had a direct line to Canada; were you not?" (Tr. at 2894) Williams asked whether Riemann was "getting too many direct orders from Canada" or "getting too much interference from Canada." (Tr. at 2895) Williams repeated, "[M]y question become[s] did you not say that there is too much direct orders coming from Canada, yes or no, sir?" (Tr. at 2896)

81. Continuing to emphasize Loewen's nationality, Williams then asked Riemann about his meeting with Loewen after the 1991 Agreement between Loewen and O'Keefe: "When

you went to Canada after you found out about this agreement . . . ." (Tr. at 2913) Williams repeated the meeting's location four more times: "Sir, do you remember after you went to Vancouver, Canada, you talked about this letter from [the Riemanns] to John Turner; is that correct?" (Tr. at 2918) "You . . . went to Vancouver; is that correct?" (Tr. at 2918) "[T]he truth is when you got back from Vancouver . . . you . . . came back to attempt to sabotage this agreement; is that correct?" (Tr. at 2922) "Did you have any participation or negotiation after you got back with your veto vote from Vancouver, Canada?" (Tr. at 2923) Williams later continued: "You weren't a happy camper when you went up to Vancouver to discuss this contract with Ray Loewen, were you?" (Tr. at 2922-23)

f. Kenny Ross

82. Loewen called Kenny Ross, an owner, former director, and consultant to several of O'Keefe's Gulf National entities. (Tr. at 2337-38, 3509) Ross had been involved in some questionable investment decisions, which prompted the Mississippi Insurance Commissioner to place Gulf National under administrative supervision. (Tr. at 527-29; 2339-49) On the stand, Ross gave only his name, address, date of birth, and social security number. In response to all other questions, Ross invoked the Fifth Amendment of the U.S. Constitution. (Tr. at 3531-35) Under the Fifth Amendment, witnesses cannot be forced to testify if the testimony would incriminate them.

g. "The Race Card Has Been Played"

83. In an effort to respond to the racial focus of O'Keefe's case-in-chief, Loewen sought to amend its witness list to permit testimony by Dr. Edward Jones and Dr. Henry Lyons of the National Baptist Convention, the largest and oldest black religious organization in the United States. (Tr. at 3593, 4752) Judge Graves permitted Loewen to add Dr. Jones and Dr. Lyons to

its witness list. In so doing, he freely acknowledged that, "on the plaintiffs' side," "the race card has already been played":

> MR. GARY: [N]ow to bring Dr. Lyons in here from the National Black Baptist Convention, what on God's earth — they just signed a big contract with them, and they wanted to show that they're doing business with black people. Now we haven't claimed that they have discriminated against black people. I mean, somewhere it's got to stop, Your Honor.
> JUDGE GRAVES: Well, I'm as sensitive to racial issues, Mr. Gary, as anyone, believe me, but from the very first — *well, actually before the trial started, race has been injected into this case, and nobody has shied away from raising it when they thought it was to their advantage* . . . . If this were a case where nobody raised it, and I had no reason to question why anybody had called certain witnesses and raised character issues and demonstrated that we did business with black folks, *I mean, that's been happening on the plaintiffs' side.* Now, maybe there's other motivation for doing it, but it certainly looked like in the vernacular of the day, *the race card has already been played* . . . .
> MR. GARY: *Right.*
> JUDGE GRAVES: So all I know is I know what's going on, and I know the jury knows what's going on, but it's going on. So if everybody wants to keep it going on, *the race card has been played*, so everybody's got one in their (inaudible) apparently.

(Tr. at 3595-96) (emphases added)

84. Judge Graves' reference to "the race card" as "the vernacular of the day" was a clear reference to the highly-publicized criminal trial of former football star O.J. Simpson, who had been acquitted only nine days earlier, by a predominately black jury, of charges that he had murdered his ex-wife and her companion. When the Simpson verdict came down, Simpson attorney Robert Shapiro criticized his own colleagues' strategy (in a widely quoted phrase) of "deal[ing] the race card from the bottom of the deck." *See Simpson Lawyer Shapiro Says Defense Overplayed Race*, Reuters World Service, Oct. 3, 1995. Willie Gary himself has continued to draw parallels between the O.J. Simpson case and the O'Keefe case. The Simpson trial was frequently referred to by the popular media as "The Trial of the Century." The title of Willie Gary's self-published excerpts from the O'Keefe trial gives a similar characterization to the

O'Keefe trial: *Winning Words: Willie E. Gary's Voir Dire, Opening Statement and Closing Argument in the Civil Trial of the Century* (App. at A519).

85. Judge Graves expressed no regret at having allowed Gary to play "the race card," thus forcing Loewen to defend against irrelevant and highly inflammatory charges of racial prejudice. Judge Graves explained to Gary, "They [defendants] just want a few black folks, they just want a few black folks on their side apparently." (Tr. at 3596) Judge Graves urged Gary: "Just enjoy it. It's a great day. We've got black folks. They want to bring black folks in." (Tr. at 3597) After Judge Graves asserted that "[e]verybody's playing the race card," Gary replied: "I want a chance to do it. That's all." (Tr. at 3597)

86. Only Reverend Jones ultimately testified. He explained how the National Baptist Convention's relationship with Loewen contributed to the "economic empowerment and development" of the local black community. (Tr. at 4753-54)

h. Raymond Loewen

87. During his cross-examination of Mr. Loewen, Gary deepened the nationalistic divide that he had earlier created between Mississippi and Canada. Gary asked Mr. Loewen about sending John Turner "down to meet with Jerry O'Keefe in Mississippi." (Tr. at 5117) Three further questions also emphasized geography: "[A]re you claiming that John Turner just came down here on his own with no instructions from you?" "Sir, are you claiming that John Turner just came — you sent him down then, right?" "Did [Turner] come down to Mississippi to talk to Mr. O'Keefe about settlement of the lawsuit, yes or no?" (Tr. at 5118) Gary then asked about Mr. Loewen himself: "[Y]ou didn't set foot in the state of Mississippi one time to work out this agreement that John Turner worked out with O'Keefe; is that correct?" (Tr. at 5119) Towards

the end of the examination, Gary repeated, "How many days did you spend in Mississippi trying to make this deal close?" "Not a single one?" (Tr. at 5181)

88. Gary reminded the jury that O'Keefe had traveled to Canada to discuss business with Loewen: "[W]hen Mike Allred and Jerry O'Keefe came to Canada, do you remember that?" (Tr. at 5147) Gary also stressed how the Riemanns "came to Canada, storm[ed] in [to] your office, called you on the carpet . . . ." (Tr. at 5119) Gary repeated: "Dave Riemann, Bob Riemann and his daddy, they came all the way to Canada, right." (Tr. at 5133)

89. Gary's questions about disagreements between the Riemanns and Loewen always emphasized Loewen's foreign nationality and geographic distance from Mississippi. Gary asked about whether Loewen had known about a particular issue "when they [the Riemanns] came to Canada?" (Tr. at 5122) Gary further asked whether Loewen had remembered a particular letter from the Riemanns "before they came up to Canada knocking on your door?" (Tr. at 5128) Gary also asked, "[T]hen you agreed with him that your philosophy of bottoms up management was not working in Mississippi with Dave Riemann and his family?" (Tr. at 5153)

90. Gary criticized Mr. Loewen for not spending his time in Mississippi:

> MR. GARY: Well, you spend most of your time up in Canada, don't you?
> MR. LOEWEN: I think the answer to that also is no, particularly this year.
> MR. GARY: Well, how much time have you spent down here in Mississippi on the firing line with people where the real action is going on within the company? How many times have you been to Mississippi to work this year?
> [The objection by Loewen's counsel was sustained because the question was argumentative.]
> MR. GARY: How many times, then, but for this trial have you been to Mississippi this year?
> MR. LOEWEN: But for this trial, I have not been in Mississippi this year.
> MR. GARY: Not one day but for this trial?
> MR. LOEWEN: That's what I said.

(Tr. at 5169)

91. Gary then raised the issue of "funeral home ownership, local versus foreign." (Tr. at 5174) He accused Loewen of failing to publicize the "foreign ownership" of Riemann Holdings: "Well, you know the difference between local ownership and foreign ownership, don't you?" "And you know that there are state laws in Mississippi that says that you can't deceive people about ownership as it relates to state versus local?" (Tr. at 5171) Gary also asked, "Of all the funeral homes, Riemann Holdings in general, here in Mississippi, Dave Riemann owns what percentage of it?" "And your group out of Canada owns how much?" (Tr. at 5175) Gary then proceeded to re-read the Attorney General's letter to the jury for a third time. (Tr. at 5174)

92. Gary also emphasized the irrelevant but inflammatory issue of Mr. Loewen's personal wealth. He began his cross-examination with an extended discussion about whether Mr. Loewen's boat was actually a "yacht." He asked, "Do they [The Loewen Group directors] know that you don't know the difference between a boat and a yacht?" "Well, you can land a helicopter on your canoe, boat or yacht, which one? Can't you land a helicopter on it?" (Tr. at 5106) "Can you land a helicopter on your yacht?" (Tr. at 5106-07) Gary persisted: "Now, sir, so you knew that it's a yacht and not a boat . . . . You know it's a yacht, don't you? You've referred to it as a yacht, haven't you?" (Tr. at 5107) This sideshow continued for several more questions: "Either it's a boat or a yacht." "Have you referred to it as a boat or yacht?" "Is it a yacht?" "I just need to know was it a yacht?" (Tr. at 5108)

93. Gary ended his cross-examination by focusing the jurors on the extent of Loewen's U.S. investments: "How much money have you all spent this year in buying up these — buying out these class of people . . . their funeral homes and their businesses?" (Tr. at 5185)

i. Earl Banks (Rebuttal)

94. On rebuttal, Gary sought to call two witnesses, Earl Banks and Hugh Parker, to testify that Loewen's relationship with the National Baptist Convention did not benefit the Convention. (Tr. at 5284-85, 5288) Ultimately, only Banks testified.

95. Loewen's counsel objected to Parker testifying. In overruling the objection, Judge Graves once again acknowledged that O'Keefe and his counsel had introduced the issue of race into the trial.

> JUDGE GRAVES: That argument would mean something to me if, at the time this trial started, we knew y'all were going to be trying to out African-American each other. We didn't know that. Y'all got in and they called all of your African-Americans in and you want yours.
> MR. ROBERTSON [Loewen's counsel]: We didn't start it, Your Honor.
> JUDGE GRAVES: Oh, I know y'all didn't start it. You're going to bring up the rear, and it ain't going too fast.

(Tr. at 5289)

4. Closing Arguments

96. Gary began his closing argument by revisiting many of the themes struck in his opening statement — nationality, race, and wealth. Gary first emphasized nationalism: "[Y]our service on this case is higher than any honor that a citizen of this country can have, short of going to war and dying for your country." (Tr. at 5539) He described the American jury system as one that O'Keefe "fought for and some died for." (Tr. at 5540-41) Gary said Loewen "thought we'd back down, and they [Loewen] didn't know that this man . . . he's a fighter . . . . He'll stand up for America, and he has." (Tr. at 5544)

97. Gary repeated his U.S.-versus-Canada theme towards the end of his closing: "[O'Keefe] fought, and some died for the laws of this nation, and they're [referring to Loewen] going to put him down for being American." (Tr. at 5588) Regarding O'Keefe's and Turner's

discussion about the 1991 agreement, Gary again drew attention to nationality and geographic location by asking, "[W]hy did they [Loewen] send John Turner all the way from Canada down here. Mr. O'Keefe had been up there, tried to settle that case, . . . and he came back minding his own business, and Ray Loewen got on the phone . . . and they sent John Turner down here. . . . They sent John Turner down here because . . . they wanted [O'Keefe] out of business . . . ." (Tr. at 5546-47)

98. Gary reminded the jury that many of O'Keefe's witnesses were Mississippians. (Tr. at 5576, 5578, 5580, 5589, 5591) Gary excused Bill Mendenhall, another of O'Keefe's witnesses, for residing in Whitfield, which is fifteen miles southeast of Jackson: "He's the one that told you that he lived over at . . . Whitfield . . . . But he said it was because his wife works over there. He wanted to make that clear. It was only because his wife worked over there." (Tr. at 5581-82) By contrast, Gary characterized Mr. Loewen as a foreign invader who "came to town like gang busters, like gang busters. Ray came sweeping through, took over Wright & Ferguson . . . ." (Tr. at 5548)

99. Gary described business disagreements between Loewen and the Riemanns in charged and nationalistic terms. For example, Gary said that "even a dog deserves a pat on the back every now and then, and [Mike Riemann] couldn't get it from those people out of Canada." (Tr. at 5549) According to Gary, while David Riemann "was down here on the firing line doing the work, making the profits, Ray Loewen was up there spending the money." (Tr. at 5570) To discuss their differences, Gary continued, "Riemann had to go up there," to Canada. (Tr. at 5570)

100. Gary repeated Espy's irrelevant testimony about the alleged unfair trade practices of Canadian wheat farmers: "'I was very bothered by certain actions which restricted Canadian products into our markets because they tried to undervalue . . . . The Canadian wheat was

underpriced. They would come in, flood our markets, our people would eat a lot of pasta, and they would not buy American wheat. They would go for cheaper wheat which was underpriced to take over the market, and then they would jack up the price, and that was not right, not consistent with what I've done in my life, try to protect people, protect the American market.'" (Tr. at 5587) Like the Canadian wheat farmers, Gary implied, Loewen would "come in" and purchase a funeral home, and "'[n]o sooner than they got it, they jacked up the prices down here in Mississippi.'" (Tr. at 5588)

101. Gary also alleged that Loewen's contract with the National Baptist Convention hurt the black community: "This is money they're [Loewen] going to get off 8.2 million African-Americans, a contract that was clearly without question unfair to those members, and you know it." (Tr. at 5541-42) Gary then ridiculed the contrary testimony by Reverend Jones: "Little Mr. Jones, . . . it was like a little fish surrounded by sharks on that contract. Y'all see how bad it is. It's terrible. It is terrible. It is terrible for the people, and they took advantage of him . . . . [I]f they take just half of them [Convention members], they make 7.9 billion dollars off of the National Baptist Convention, Baptist [C]onvention get 1 percent of this." (Tr. at 5553-55) This $7.9 billion figure, although frequently referred to by Gary (Tr. at 5554-55, 5577-78, 5704, 5799), is absurd on its face and was unsupported by the evidence.

102. In summing up the damages for the jury, Gary requested over $105 million in compensatory damages. (Tr. at 5713) Of that amount, $74,500,000 represented damages for emotional distress, calculated at the rate of $50,000 per day since the alleged breach of the 1991 agreement. (App. at A731-32; Tr. at 5566, 5713-14)

103. To conclude, Gary drew an analogy between Loewen's competition with O'Keefe and the Japanese bombing of Pearl Harbor: "[S]omething inside [Jerry O'Keefe] said . . . fight

on. [Loewen] lied to him, and a voice said fight on. . . . [W]hen they cheated him, a little voice said fight on. . . . He's a fighter, and he's fought them. You see, that little voice, . . . it's called faith . . . . It's called pride, in America. . . . It is called love, love for your country . . . . You see, that little voice didn't just start speaking in 1991 when we started this lawsuit. That voice started back in 1941 on December 7th when our boys were bombed in the morning while they were sleeping. It was a Sunday morning, Sunday morning, caught them sleeping, got bombed, but on December the 8th, early in the morning, Jeffy O'Keffe got out of his bed and found his way down to the recruiters office. He was a just a young lad then, just 19 years of age, but he wanted to fight for his country, and he fought, and he fought." (Tr. at 5593-94)

5. The Initial Verdict

104. In all punitive damages cases, Mississippi law requires a bifurcated trial procedure. At the first stage, the jury determines liability and compensatory damages; then, at the second stage, the jury considers under a different and higher standard of proof whether to award punitive damages. The jury cannot consider liability and punitive damages at the same time. Miss. Code Ann. § 11-1-65(b)-(c).

105. On November 1, 1995, the jury returned a verdict for O'Keefe of $260,000,000. In so doing, the jury assigned multiple damage awards for conduct that could have caused only one indivisible harm:

(Wright & Ferguson contracts)	
Breach of one or more of the Wright & Ferguson contracts:	$31,200,000
Tortious interference with a Wright & Ferguson contract:	$7,800,000
Tortious breach of a Wright & Ferguson contract:	$23,400,000
Breach of covenants of good faith in a Wright & Ferguson contract:	$15,600,000
(1991 Agreement)	
Willful or malicious breach of the 1991 Agreement:	$54,600,000
Tortious breach of the 1991 Agreement:	$54,600,000
Breach of covenant of good faith in the 1991 Agreement:	$36,400,000
State antimonopoly law:	$18,200,000
Common law fraud:	$18,200,000
	Total: $260,000,000

(App. at A651-58)

106. After the verdict was announced, the jury foreman wrote Judge Graves a note explaining that the $260 million "covers both loss [sic] damages ($100,000,000), and punitive damages ($160,000,000). . . . The $260,000,000 was a 'negotiated compromise' between a low of $100,000,000, and a high of $300,000,000. Total of loss damages and punitive damages." (App. at A659)

107. Loewen moved for a mistrial, arguing that the verdict was biased, excessive, and contrary to the Court's instructions. (Tr. at 5738-39) Judge Graves denied Loewen's motion without discussion. (Tr. at 5739) Based on the jury foreman's note, and after refusing to poll the jury as Loewen had requested, Judge Graves "reformed" the verdict to reflect $100 million in compensatory damages and then continued with a punitive damages phase. (Tr. at 5742-44)

6. The Punitive Damages Phase

108. The entire punitive damages hearing occurred on a single day, November 2, 1995. Gary presented only two witnesses, who testified for "no more than 10, 15 minutes each," about the alleged net worth of Loewen. (Tr. at 5754)

109. Judge Graves informed the jury that he had "accepted" its $100 million award of compensatory damages, but had not "accepted" its $160 million punitive damages award. (Tr. at 5753) The obvious implication was that a $160 million punitive damages award would be inadequate.

110. In his opening statement on punitive damages, Gary made a provincial appeal to Mississippian and American interests: "Punitive damages, no doubt about it, it's going to punish them. And if you don't do that, then you come short of your duty. It's to stop wrongdoing. It's to deter wrongdoing. It's to make sure that this doesn't happen to the citizens of Mississippi or the citizens of this nation again." (Tr. at 5755) Gary stated that Loewen "didn't feel sorry for the people up in Corinth," another Mississippi town in which Loewen owned funeral homes, "when they gouged them." (Tr. at 5756) Gary concluded by appealing directly to the jury's passion: "[M]ake a decision based on your heart." (Tr. at 5756)

111. O'Keefe's chief punitive damages witness, Bernard Pettingill, testified that the net worth of Loewen was almost $3.2 billion. (Tr. at 5762-63) Pettigill acknowledged that the total market capitalization of Loewen, based on the then-current value of its shares, was less than $1.8 billion. (Tr. at 5762-64) However, Pettigill asserted that the market had failed to take into consideration the "future value" of Loewen's contract with the National Baptist Convention, and that this "future value" accounted for the difference between the market's valuation of under $1.8 billion and his own valuation of almost $3.2 billion. (Tr. at 5762)

112. Loewen presented expert testimony that its entire net worth, as reflected in official filings with the U.S. Securities and Exchange Commission, was between $600 and $700 million. (Tr. at 5771-72) Loewen's expert further testified that Loewen's market value was approximately $1.7 billion. (Tr. at 5777)

113. Gary began his closing argument on punitive damages by emphasizing Mr. Loewen's supposed arrogance for not being present in Mississippi: "Ray Loewen is not here today. He's not here, and I think that's the ultimate arrogance, ultimate arrogance. He didn't even show up today. That's the ultimate arrogance for him to think that he can do what he's doing to people like Jerry O'Keefe . . . and to the consumers of this state, and he can deal with it in this fashion . . . ." (Tr. at 5794-95) Gary further stated that "Ray comes down here, he's got his yacht up there . . . ." (Tr. at 5801)

114. Focusing again on geography, Gary alleged that Loewen officials were "smiling when they charge grieving families in Corinth, Mississippi." (Tr. at 5796) Gary also invoked state provincialism in urging the jury to award O'Keefe a large sum of punitive damages: "You can say that down here in Mississippi, we sent a message to Ray Loewen and his group that you're not going to come down here, buy up these small family funeral homes, target . . . [those] who are in disarray . . . ." (Tr. at 5797)

115. As he had done previously, Gary stressed the National Baptist Convention contract, repeating his facially absurd and factually unsupported charge that Loewen would make "over [$]7.9 billion, that's off of that one contract, and that's just selling vaults." (Tr. at 5799) Gary further alleged, again without factual support, that Loewen discriminated against blacks in selling related burial services: "You ain't going to buy a vault and put it in your garage. You pay for a vault, you're going to want a burial plot. That's not even included. That's not even included, members of the jury, and to add additional insult to injury, they locked the National Baptist Convention in, and what they did is they said, '*You can't even come to our funeral homes for burial.* We'll sell you a vault, and that's it.' . . . They [Loewen] want to take the unimproved cemeteries . . . black cemeteries . . . . [T]hey want to take them, and he's [Ray Loewen is] going

to get them for nothing, and then resell them, and they're going to make billions of dollars. You've got to hit them now, and 1 billion dollars, members of the jury, will get their attention." (Tr. at 5799-5800) (emphasis added) There was, of course, no evidence whatsoever for the false suggestion that Loewen-owned funeral homes would not welcome National Baptist Convention members "for burial."

116. Gary concluded his closing argument on punitive damages with one final geographic reference: "1 billion dollars, 1 billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may not ever get this chance again. And you're not just helping the people of Mississippi, but you're helping . . . families everywhere." (Tr. at 5809)

117. On the afternoon of November 2, 1995, the jury returned a punitive damages award of $400 million. (Tr. at 5810) The $500 million total verdict was far and away the largest in Mississippi's history, *see* Mississippi Economic Council, *Populist Jurisprudence* 7, 26-27 (1996); was 78% of Loewen's entire net worth based on its June 30, 1995 financial statements (App. at A736); and was over 100 times the value of either the Loewen insurance company or the O'Keefe funeral homes that were the principal subjects of the underlying contractual dispute. The $400 million punitive damages award was 50 times the size of the largest punitive damages award ever reviewed by the Mississippi Supreme Court, and more than 200 times the size of the largest punitive damages award ever upheld by the court. *See Populist Jurisprudence, supra*, at 7, 26-27.

118. After the verdict, the jury foreman made a public statement that Ray Loewen "'was a rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy. It didn't work.'" N. Bernstein, *Brash Funeral Chain Meets Its Match in Old South*, New York Times, Jan. 27, 1996, at A1, A6.

119. Loewen filed three post-verdict motions to set aside or reduce the biased and excessive verdict. (App. at A660) Judge Graves denied all motions orally (App. at A814, A816) and entered judgment on the verdict.

7. The Appeal Bond And Coerced Settlement

120. Mississippi law generally requires appellants to post a bond for 125% of the judgment. Miss. R. App. P. 8(a). However, Mississippi law also provides for reduction or elimination of the bond requirement "for good cause shown." Miss. R. App. P. 8(b). The Mississippi Supreme Court promulgated the "good cause" rule in response to *Henry v. First National Bank of Clarksdale*, 424 F. Supp. 633, 638-39 (N.D. Miss. 1976), *aff'd*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), in which the U.S. federal courts held that the United States Constitution bars application of the full 125% bonding requirement in cases where the cost of posting the bond "would effectively bankrupt" the party seeking to appeal (595 F.2d at 305).

121. In this case, 125% of the judgment was $625 million — virtually all of Loewen's net worth. (App. at A736) The surety bond companies that Loewen contacted required 100% collateral in the form of a $625 million letter of credit. (App. at A980, A994)

122. Loewen could not have financed a $625 million letter of credit through new debt. Loewen already had approximately $736 million of outstanding debt, and taking on $625 million in new debt would have drastically increased its debt-equity ratio. That, in turn, would have violated covenants that Loewen had made to existing creditors, thus making the $736 million immediately due and payable. (App. at A982-83) Indeed, industry analysts speculated that "obligations related to the bond could trigger defaults on Loewen's senior debt and bank credit

lines." B. Simon, *Damages Award Puts Loewen in Jeopardy*, Financial Times, Jan. 26, 1996, at 22. Loewen's existing creditors refused to waive any of their covenants. (App. at A998, A1005)

123. The only other way for Loewen to finance a $625 million letter of credit was to quickly sell new equity at "fire-sale" prices. (App. at A985-86) The cost to Loewen of pursuing an appeal — including the bonding cost itself (assuming a bond was available), the cost of selling equity at distress prices to finance the bond, and the added costs of continuing to finance TLGI's operations — was conservatively estimated at well over $200 million for the first two years alone. (App. at A1145) Loewen could have recovered virtually none of these costs even if it had completely prevailed on appeal.

124. On November 28, 1995, Loewen filed a motion to reduce the appeal bond to $125 million (*i.e.*, 125% of the *compensatory* damages awarded by the jury). Loewen explained why it could not feasibly obtain a $625 million bond. (App. at A827-28) To protect O'Keefe's interest as a judgment creditor, Loewen offered, while an appeal was pending, to (i) notify the court and O'Keefe before conveying or encumbering any significant assets, (ii) notify the court and O'Keefe before making any increased dividend payments, and (iii) provide O'Keefe with monthly financial reports. (App. at A1025-26)

125. On November 29, Judge Graves concluded that there was not "good cause" for *any* reduction in the $625 million appeal bond. Judge Graves asserted that, despite the protections offered by Loewen, *no* reduced bond would adequately protect O'Keefe's interests. (App. at A1078) By contrast, the U.S. federal courts have concluded that, because punitive damages are by definition a "windfall" to plaintiffs, defendants should not be required to post an appeal bond for the punitive component of a potentially bankrupting judgment. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 796-97 (7th Cir. 1986);

see also Trans World Airlines, Inc. v. Hughes, 314 F. Supp. 94, 96 (S.D.N.Y. 1970) (courts are permitted to waive appeal bond "so that, in effect, the defendant's right of appeal would not be destroyed").

126. Loewen immediately sought review from the Mississippi Supreme Court. Despite granting Loewen interim relief on November 30, 1995 (App. at A1082), and on December 19, 1995, the Mississippi Supreme Court ultimately concluded that there was no "good cause" for any reduction in the appeal bond. (App. at A1176) On January 24, 1996, over the dissent of two justices, that court ordered Loewen to post a $625 million bond, within seven days, in order to pursue an appeal. (App. at A1176)

127. The Mississippi Supreme Court decision, which gave Loewen only one week to come up with hundreds of millions of dollars in financing, effectively foreclosed Loewen's appeal rights. On January 29, 1996, rather than incur well over $200 million in costs in 1996 and 1997 alone to pursue an appeal bond that still might not be available, Loewen settled the *O'Keefe* litigation, under extreme duress, for $175 million. Under the settlement, O'Keefe received $50 million in cash on January 31, 1996, 1.5 million Loewen shares on February 15, 1996, and annual payments of $4 million for the next twenty years. C. Osterman, *Loewen Escapes Bankruptcy with Lawsuit Settlement*, Reuters, Jan. 29, 1996. Although only 35% of the verdict and judgment, the $175 million settlement was still 30 to 50 times greater than the total value of the principal companies at issue in the underlying commercial dispute.

128. The settlement between O'Keefe and Loewen did not and could not waive Loewen's right to pursue this claim against the United States.

C. The Harms Suffered By Claimants/Investors

129. The excessive verdict and coerced settlement caused various damages to Loewen, including not only the $175 million settlement, but also (i) reduced opportunities for growth and investment, (ii) harm to Loewen's business reputation, (iii) reduced credit ratings, (iv) increased financing costs, and (v) other harms. Loewen suffered these harms beginning on November 1, 1995 and continuing to the present. Because of these immediate and continuing harms, the *O'Keefe* litigation has, unfortunately, become the defining moment in Loewen's recent corporate history.

130. Several industry analysts have noted the grave impact of the excessive verdict and coerced settlement on Loewen's future business opportunities. In discussing the initial $260,000,000 verdict, one analyst noted: "'It's a tremendous amount of money. That would seriously restrict their acquisition program, which in turn fuels earnings growth.'" C. Osterman, *Loewen Stock Plunges After Surprise Damage Ruling*, Reuters, Nov. 2, 1995. That analyst concluded that Loewen's "rapid growth [would] slow dramatically as a result of its legal troubles, which are likely to drain financial resources and hurt the company's reputation." C. Osterman, *Loewen's Woes Worsen with New Lawsuit*, Reuters, Nov. 7, 1995.

131. The excessive verdict and coerced settlement harmed Loewen's business reputation as well as its growth prospects. The *Wall Street Journal* explained:

> The company's ability to conduct its day-to-day business in the ultraconservative funeral-services sector depends heavily on its reputation for straight-dealing, which already has taken a beating because of publicity surrounding the jury verdict against the company. In addition, its growth prospects hinge on its ability to continue acquiring funeral homes and related assets in U.S. and Canada, where it has aggressively expanded its operations in recent years.

T. Carlisle, *Ruling May Force Loewen to Seek Bankruptcy Shelter*, Wall St. J., Jan 25, 1996, at B5.

132. The excessive verdict and coerced settlement also adversely affected Loewen's ability to obtain financing. For example, the *O'Keefe* litigation prompted Standard and Poor's to revise Loewen's credit rating from "positive" to "negative." C. Osterman, *Damage Award Plunges Loewen into Legal Nightmare*, Reuters, Nov. 5, 1995.

133. Loewen's financial vulnerability after the *O'Keefe* litigation prompted an attempted takeover in 1996, which Loewen spent substantial resources defending against. R. Siklos, *A Big Bump on Loewen Group's Long Winding* Road, Financial Post, Sept. 16, 1997; J. Schreiner, *Loewen Plays Catch-Up with a Vengance*, The Financial Post (Toronto), June 13, 1997, at 24; C. Osterman, *Funeral Mogul Loewen Fights Back*, Reuters Financial Service, Jan. 26, 1997; G. Hassell, *Talk of the Funeral Business*, The Houston Chronicle, Oct. 26, 1996, at 1.

134. Loewen continues to suffer the effects of the excessive verdict and coerced settlement. Industry analysts have concluded that Loewen's present financial condition is directly traceable to the Mississippi litigation. B. Constantineau, *Loewen Eagle Grounded for Good, Analysts Fear: Company's Woes Can Be Traced Back to Mississippi Breach of Contract Lawsuit, Analysts Say*, Vancouver Sun, August 1, 1998, at H1; Siklos, *supra*; D. Francis, *Diamonds and Tourism Are Today's Bargains*, The Financial Post (Toronto), Oct. 15, 1998, at 25; J. Vardy, *Canadian Funeral Companies Eye the Pickings at Loewen*, The Financial Post (Toronto), Oct. 14, 1998, at 1.

135. In July 1998, Loewen's largest institutional investor called for the sale of the company on the basis that it had failed to recover from the Mississippi lawsuit. *Sell Loewen, Institutional Shareholder Demands*, Vancouver Sun, July 29, 1998.

136. The excessive verdict and coerced settlement also caused severe damage to Raymond Loewen, including (i) decrease of value of his investment in TLGI and (ii) harm to his reputation.

137. The financial markets concluded that TLGI had suffered severe damage above and beyond the $175 million settlement. When the $500 million verdict was announced, the price of TLGI stock was "devastated." W. Chow, *Loewen Faces $500 Million US Payout: Mississippi Court Orders Damages in Acquisition Suit: Loewen: News Stuns Investors*, Vancouver Sun, Nov. 3, 1995, at D1. On October 31, 1995, the day before the first verdict was announced, TLGI closed at C$53¾. After the settlement was announced, TLGI closed at C$39, a 27.4% drop from its value before the November 1 verdict. The total drop in market value was approximately US $550 million.[7]

138. Mr. Loewen's reputation was gravely damaged by the *O'Keefe* litigation, in which he was repeatedly and unfairly derided as, for example, a "rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy.'" N. Bernstein, *Brash Funeral Chain Meets Its Match in Old South*, New York Times, Jan. 27, 1996, at A1, A6.

IV. NAFTA VIOLATIONS

The conduct of the *O'Keefe* litigation violated NAFTA provisions barring discrimination against foreign investors and their investments, NAFTA provisions requiring a minimum standard

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[7] Charts illustrating the damage to Loewen's market value caused by the *O'Keefe* verdict are attached as Exhibit E. The first chart shows Loewen's Toronto Stock Exchange price performance from July 1, 1995 through June 30, 1996. The second chart compares Loewen's stock performance with Service Corporation International's, an industry competitor, and with the S&P 500, from January 1990 to the present.

of treatment for investments of foreign investors, and NAFTA provisions barring uncompensated or discriminatory expropriation of investments of foreign investors.

A. Discrimination (Articles 1102 and 1105)

139. The introduction of extensive anti-Canadian and pro-American testimony and counsel comments during the *O'Keefe* litigation violated Articles 1102 and 1105 of NAFTA. This irrelevant and highly prejudicial testimony and commentary dominated the trial, inflamed the passions of the jury, and produced the grossly excessive verdict and judgment. As Sir Robert Jennings has concluded: "The transcript of the proceedings shows clearly and consistently that the quite ruthless and blatant working up of both racial and nationalistic prejudice" was "the weapon by which counsel for the plaintiffs was able to bring about the bizarre verdict of the jury." Jennings Op. at 4; *see also id.* at 12 ("both the Judge and counsel knew perfectly well that counsel was intentionally stirring up racial and nationalistic bias against Canada and Canadians"); Neely Affid. at 6 ("During the course of the *O'Keefe v. Loewen* trial, the Plaintiffs' lawyers reiterated three themes that had the effect of inflaming the passions of the jury, namely race, wealth, and many of the defendants' Canadian citizenship.").

140. By its terms, Article 1102 of NAFTA requires the United States and its states to accord Canadian investors and their investments treatment no less favorable than the treatment accorded to similarly situated United States investors and their investments. In pertinent part, Article 1102 provides:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition,

expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

In being subjected to extensive, irrelevant, and highly prejudicial comments about its nationality, Loewen was treated less favorably than similarly situated United States investors and their investments.

141. The introduction of anti-Canadian evidence and comments during the *O'Keefe* litigation also violated Article 1105 of NAFTA, which provides in pertinent part that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law." Under international law, an alien is entitled to an impartial trial untainted by invidious discrimination. *See, e.g., Restatement (Second) of Foreign Relations Law of the United States* § 181 (1965); A. Freeman, *The International Responsibility of States for Denial of Justice*, 267, 268, 549, 557 (1970); E. Borchard, *The Diplomatic Protection of Citizens Abroad* 334 (1916); S. Verosta, *Denial of Justice*, *in* 1 Encyclopedia of Public International Law 1007, 1008 (1992); 8 M. Whiteman, *Digest of International Law* 407, 722, 724, 725 (1967); 5 G. Hackworth, *Digest of International Law* 527 (1943).

142. A legal proceeding violates international law if it includes irrelevant and prejudicial remarks about the nationality of an alien. For example, the Cuban trial of an American violated international law in part because it was conducted "with long political harangues and a 'Roman Circus Atmosphere.'" *In the Matter of Jennie M. Fuller* (U.S. v. Cuba), 1971 Foreign Claims Settlement Commission of the United States — Annual Report to the Congress 53, 58-59. In *Fuller*, the United States successfully argued that "long political harangues bearing no relation to

the facts in the case" and the creation of "an atmosphere of political diatribe" are "wholly improper and prejudicial." Letter from U.S. Department of State to Cuban Foreign Ministry of 11/11/60, *quoted in* 8 M. Whiteman, *supra*, at 720. Similarly, a Panamanian trial violated international law because the Panamanian government "denounced" the United States during the trial and "improperly went out of [its] way to excite hostility" against the American defendant. *Solomon v. Panama (U.S. v. Pan.)*, 6 R.I.A.A. 370, 373 (1933). In awarding damages to the defendant, the United States-Panama Claims Commission concluded that the trial had been improperly "influenced by strong popular feelings" and strong "local sentiment." *See id.*

143. As explained in detail above, irrelevant and discriminatory remarks infected the entire trial in this case, including Gary's initial description of O'Keefe as "one of your own" during *voir dire* (App. at A328), Gary's opening statement that O'Keefe was a "fighter" for "our country" and an "American hero" (Tr. at 50, 54); Gary's opening statement that Loewen had "descended on the State of Mississippi" (Tr. at 58); Espy's entirely irrelevant testimony about the allegedly unfair trade practices of Canadian wheat farmers (Tr. at 1101-02); Gary's closing statement that O'Keefe would "stand up for America, and he has" (Tr. at 5544); and Gary's outrageous analogy between Loewen's competition against O'Keefe and the Japanese bombing of Pearl Harbor (Tr. at 5593-94). The impact of these xenophobic appeals was reflected in the grossly excessive verdict and in the jury foreman's public statement that Ray Loewen "'was a rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy.'" N. Bernstein, *Brash Funeral Chain Meets Its Match in Old South*, New York Times, Jan. 27, 1996, at A1, A6. The trial court's invidious discrimination severely damaged Loewen when the verdict was rendered and when the Mississippi Supreme Court refused to reduce the appeal bond.

B. Minimum Standard Of Treatment (Article 1105)

144. Even apart from its rank anti-Canadian bias, the *O'Keefe* litigation failed to satisfy the "minimum standard of treatment" to which all investments of Canadian investors are entitled under Article 1105 of NAFTA. Article 1105 requires treatment "in accordance with international law, including fair and equitable treatment." That requirement was violated in three different ways.

1. Substantive Denial of Justice

145. Under settled principles, an egregiously wrong judicial judgment violates international law and is sometimes described as a substantive "denial of justice." *See, e.g., Rihani Claim*, Decision 27-C, American Mexican Claims Report, 254, 257 (1948) ("clear and notorious injustice" violates international law; thus, "international arbitral tribunal" may "put aside a national decision presented before it" and "scrutinize its grounds of fact and law"); *The Texas Company Claim*, Decision 32-B, American Mexican Claims Report, 142, 143 (1948) ("palpable injustice in the administration of law" violates international law); Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, Article 9, 23 Am. J. Int'l L. 133 (Special Supp. 1929) (hereinafter "1929 Draft Convention") ("manifestly unjust judgment" violates international law); A. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law*, XIV Can. Y.B. Int'l L. 73, 91 (1976) ("denial of justice" includes "unjust decisions"); E. Borchard, *The Diplomatic Protection of Citizens Abroad* 340 (1916) ("grossly unfair or notoriously unjust decision" violates international law).

146. The United States repeatedly has espoused the view that manifestly unjust judicial decisions violate international law. In the *Denham Claim* (U.S. v. Pan. 1933), Hunt's Report

491, 500 (1934), the United States argued that "'denial of justice' . . . has come . . . to comprehend all acts of governmental authorities, legislative, executive, *and judicial*, which result in the failure of parties concerned to receive substantial justice at the hands of such governmental agencies after due efforts have been exerted in the pursuit of their rights" (emphasis shifted). Thus, the United States concluded, "a nation is responsible for the *manifestly unjust* decisions of its courts." *Id.* at 506. On another occasion, the U.S. Secretary of State wrote that judicial decisions violate international law "when palpable injustice had been done, or a manifest violation had been committed of the rules and forms of proceeding." Letter from Mr. Forsyth, Sec. of State, to Mr. Welsh, Mar. 14, 1835, in 6 Moore's *International Law Digest* 696 (1906).

147. In civil cases, judicial decisions have often been held to violate international law. In the *Rihani Claim*, for example, an international commission reviewed a decision by the Mexican Supreme Court and found it "to be such a gross and wrongful error as to constitute a denial of justice." Decision 27-C, American Mexican Claims Report, at 257. Similarly, in *Bronner v. Mexico* (U.S. v. Mex. 1874), an international umpire awarded compensation to a claimant whose goods had been confiscated by Mexican customs authorities. *See* 3 *Moore's Int'l Arbitration* 3134. Although a Mexican court had concluded that the confiscation was permissible, the umpire found that decision to be "so unfair as to amount to a denial of justice." *Id.* In the *Burt Case* (U.S. v. Gt. Brit. 1923), Nielsen's Report 588 (1926), an international tribunal disagreed with the result of a property adjudication by the Fiji Islands' Board of Land Commissioners, and thus ordered that the claimant receive just compensation. *Id.* at 596-97.

148. In the criminal context as well, courts violate international law when they impose punishment disproportionate to the offense. Thus, courts violate international law when they impose unreasonably harsh sentences on aliens, *see, e.g.*, *Quintanilla Claim* (U.S. v. Mex. 1926),

Opinions of the Commissioners 136, 138 (1927); *Dyches Claim* (U.S. v. Mex.), Opinions of the Commissioners 193, 197 (1929); A. Freeman, *Denial of Justice* at 196-214, or when they impose unreasonably lenient sentences on citizens who commit crimes against aliens, *see, e.g., Kennedy Claim* (U.S. v. Mex.), Opinions of the Commissioners 289, 292 (1927); *Morton Claim* (U.S. v. Mex.), Opinions of the Commissioners 151, 160 (1929). Citing these principles in *Denham*, a civil case, the United States itself espoused the position that a judicial judgment disproportionate to the underlying offense is a denial of justice and a violation of international law. *See Denham*, Hunt's Report, at 506.

149. International law does not distinguish between judgments rendered after bench trials and those rendered after jury trials. Either kind of judgment may deny justice: "to maintain that a state may be held responsible for a manifestly unjust judgment of a court means little unless it includes also the verdict of a jury when it is equally unjust." J. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, [1929] Brit. Y.B. Int'l L. 181, 185. Judges and juries "are inseparable parts of the judicial organ, and for the act of either when it constitutes a denial of justice the [S]tate, it would seem, should be equally responsible." *Id; see also* A. Freeman, *Denial of Justice*, *supra*, at 363 (finding "no ground for distinguishing" jury verdict "from other cases in which the judgment of a court is impugnable").

150. Under international law, large awards of punitive damages are suspect. Most countries do not recognize punitive damages at all. *See, e.g.*, Brand, *Punitive Damages and the Recognition of Judgments*, NILR 143, 165, 168 at n.150 (1996) (Germany); Kojima, *Cooperation in International Procedural Conflicts: Prospects and Benefits*, 57 Law & Contemp. Probs. 59, 64 (1994) (Japan); A. Cortese & K. Blaner, *Civil Justice Reform in America: A*

Question of Parity with Our International Rivals, 13 U. Penn. J. of Int'l Bus. L. 52 (1992) ("The entire concept of using the civil law, as opposed to the criminal law, to punish a litigant simply does not exist outside the United States."). Even countries that permit punitive damages in some circumstances disdain the frequency and size of awards in the United States. *See, e.g.*, R. Kreindler & J. Holdsworth, *Transnational Litigation: A Practitioner's Guide* at CAN-82 (1997) (Canada would not enforce "[a]wards of punitive damages on the scale seen in some American jurisdictions"); F. Juenger, *A Hague Judgments Convention?*, 24 Brooklyn. J. Int'l L. 111, 113 (1998) (proposed treaty for recognition of judgments failed because British "were leery of excessive American jury verdicts and punitive damages awards"). Although the domestic law of any individual country is not controlling, these standards are collectively significant because international law "may be ascertained . . . by the general usage and practice of nations." *United States v. Smith*, 5 Wheat. (18 U.S.) 153, 160-61 (1820); *see Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

151. The $400 million punitive damages award at issue here is grossly excessive and unjust, and therefore violates international law, under any conceivably applicable standard. As explained in detail above, that award was 50 times the size of the largest punitive damages award ever considered by the Mississippi Supreme Court; more than 200 times the largest punitive damages award ever affirmed by that court; 16 times the size of the economic damages (including consequential damages) allegedly suffered by O'Keefe; more than 80 times the entire net worth of the principal companies at issue in the underlying business transaction; and 63% of Loewen's entire net worth.

152. Large awards for emotional distress are equally suspect under international law. In contrast to the United States tort system, which permits subjective awards for pain and suffering

that are disproportionate to the plaintiff's physical or economic damages, *see, e.g.*, W.P. Keeton, et al., *Prosser and Keeton on Torts* § 54, at 359-61 (5th ed. 1984), almost all other countries require tort damages to be proportionate to physical or economic damages. *See, e.g., Re the Enforcement of a U.S. Judgment*, 3 Int'l Litig. Proc. 430, 437-38 (1992) (German court refuses to recognize U.S. award for pain and suffering); *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1149 (N.D. Tex. 1980) ("However similar the laws of Texas and Canada may be with regard to compensatory damages, they are widely divergent in the areas of compensation for pain and suffering."). As explained above, the generally prevailing municipal legal standards shed light on the appropriate international-law standard. *See Smith*, 5 Wheat. (18 U.S.) at 160-61.

153. The jury award of approximately $75 million in emotional damages was grossly excessive and unjust, and therefore violated international law, under any conceivably applicable standard. As explained above, those damages — calculated at the absurdly inflated rate of $50,000 per day, even though the underlying alleged injuries were purely economic in nature — were three times the size of the economic damages (including consequential damages) allegedly suffered by O'Keefe.

154. The economic damages awarded by the *O'Keefe* jury were grossly excessive. Even in the United States (as elsewhere), it is well-settled that consequential damages should not be awarded in contract cases unless they are foreseeable. *See, e.g., Restatement (Second) of Contracts* § 244 cmt. a (1977); *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In this case, the vast bulk of the economic damages claimed and awarded were consequential damages allegedly flowing from the administrative supervision of Gulf National. Under any reasonable standard of foreseeability, those damages should not have been recoverable.

155. In total, the jury awarded O'Keefe $500 million in a case where the underlying dispute involved the exchange of two funeral homes worth approximately $2.5 million for one insurance company worth approximately $4 million. In the words of Sir Robert Jennings, the amount of this award, and the resulting judgment, is "bizarre" (Jennings Op. at 4), "outrageous" (*id.* at 8), "astonishing" (*id.* at 13), and "so bizarrely disproportionate as to almost defy belief" (*id.*). If the judgment against Loewen in the *O'Keefe* litigation was not a denial of justice, then no civil judgment is or could be.

2. Procedural Denial of Justice

156. A state also violates international law, and commits what is sometimes described as a procedural "denial of justice," when it permits an "improper administration of civil and criminal justice as regards an alien, including denial of access to courts, [and] inadequate procedures," Adede, *supra*, at 91, or when it imposes "unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, [or] failure to provide those guaranties which are generally considered indispensable to the proper administration of justice," 1929 Draft Convention Art. 9. *See, e.g., Idler v. Venezuela* (U.S. v. Venez. 1885), 4 *Moore's Int'l Arbitrations* 3491 (1898); *Brown Case* (U.S. v. Gt. Brit. 1923), Nielsen's Report 187 (1926); *Barcelona Traction* (Belg. v. Spain), 46 I.L.R. 288, 318 (1970) (separate opinion of J. Tanaka); *Restatement (Third) of Foreign Relations Law of the United States* § 711 cmt. a (1987); E. Borchard, *The Diplomatic Protection of Citizens Abroad* 334-37 (1915).

157. The Mississippi trial court committed procedural denials of justice by allowing O'Keefe's lawyers to repeatedly elicit irrelevant and highly prejudicial testimony, and to make irrelevant and highly prejudicial comments, about the nationality, race, and class of the principal parties in the litigation. As explained at length above, that testimony and those comments

pervaded the entire trial, inflamed the jury against Loewen, and produced the ultimate excessive verdict and judgment.

158. The trial court and the Mississippi Supreme Court also committed procedural denials of justice by requiring Loewen to post a $625 million bond in order to pursue its appeal. As explained in detail above, this arbitrary application of the appeal bond rule effectively foreclosed Loewen's right of "access," 1929 Draft Convention Art. 9, to the Mississippi appellate courts. The Mississippi courts thus effectively compelled Loewen to pay a coerced and excessive $175 million settlement. In so doing, the courts not only solidified the damage flowing from the biased trial and excessive verdict, but committed independent procedural denials of justice as well.

3. Denial of "Fair and Equitable Treatment"

159. The same actions that constituted substantive and procedural denials of justice under international law also constituted denials of "fair and equitable treatment" within the meaning of Article 1105 of NAFTA.

160. The "fair and equitable treatment" standard set forth in Article 1105, which is drawn from several United States Bilateral Investment Treaties, including the Model United States BIT, goes "far beyond" the minimum protections afforded to foreign investors under international law. *See* F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 Brit. Y.B. Int'l L. 241-244 (1981) ("fair and equitable treatment" standard "is a much wider conception" and goes "much further" in protecting foreign investments); K. Vandevelde, *United States Investment Treaties: Policy and Practice* 2, 76 (1992) ("fair and equitable treatment" is an "additional" standard that provides "a baseline of protection" even where other international law protections are inapplicable); Caudgeon, *United States Bilateral Investment Treaties*, 4 Int'l Tax & Bus. Law. 105, 125 (1986) (concept of fairness and equity

serves as a guide to interpreting and applying treaty provisions "in a manner most favorable to the investor").

161. For the same reasons that the Mississippi courts denied justice to Loewen, they also failed to provide Loewen with "fair and equitable treatment." Indeed, even if the *O'Keefe* litigation did not rise to the level of a "denial of justice" under international law, it would nonetheless violate the "much wider" protection afforded under the "fair and equitable treatment" standard.

C. Expropriation (Article 1110)

162. The excessive verdict, denial of appeal, and coerced settlement were tantamount to an uncompensated expropriation in violation of Article 1110 of NAFTA.

163. Article 1110(1) of NAFTA states:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law and Article 1105(1); and
> (d) on payment of compensation in accordance with paragraphs 2 through 6 [of this Article].

164. Under settled international law, an expropriation occurs where government action interferes with an alien's use or enjoyment of property. *See, e.g., Tippetts, Abbett, McCarthy, Stratton v. Iran*, 6 Iran-U.S. C.T.R. 219, 225 (1984); *Starrett Housing Corp. v. Iran*, 4 Iran-U.S. C.T.R. 122, 154, 172 (1983); *Restatement (Third) Foreign Relations Law of the United States* § 712, cmt. g (1987); L. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, 553 (1961) (hereinafter "1961 Draft Convention").

165. Expropriation can occur where the State itself acquires nothing of value, but "at least has been the instrument of redistribution." A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal* 66 (1994). *See, e.g., Poehlmann v. Spinnerei AG*, 3 U.S. Ct. Rest. App. 701, 702-04, 710 (1952); G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 188 (1996); *Tippetts*, 6 Iran-U.S. C.T.R. at 225.

166. The United States itself has long recognized that expropriation covers "a multitude of activities having the effect of infringing property rights." Statement of the President, U.S. Government Policy on International Investment (Sept. 9, 1983), reported in [1981-88] 2 Cumulative Digest of U.S. Practice in International Law, 2304, 2305; *see also* 8 M. Whiteman, *Digest of International Law* 1007 (1967); *Corn Products Refining Company Claim*, 1955 Int'l L. Rep. 333, 334.

167. The excessive verdict, denial of Loewen's appeal rights, and coerced settlement violated Article 1110 for several reasons. *First*, these measures had the effect of severely infringing and interfering with Loewen's property rights, and thus were tantamount to expropriation. *Second*, Mississippi has no "public purpose" for providing such huge private windfalls to O'Keefe, as required by Article 1110(1)(a). *Third*, as explained above, the verdict and coerced settlement were the product of anti-Canadian discrimination, and thus not imposed "on a non-discriminatory basis" under Article 1110(1)(b). *Fourth*, for reasons explained above, the verdict, denial of appeal, and coerced settlement satisfied neither Article 1105(1) nor the alternative "due process" requirement under Article 1110(1)(c). *Fifth*, Loewen has not been compensated either for the coerced settlement or for the further harms it has suffered as a result of the *O'Keefe* litigation.

V. LIABILITY OF THE UNITED STATES

168. For two separate reasons, the United States is liable under NAFTA for the actions of the State of Mississippi.

169. First, under Article 105 of NAFTA, the United States is absolutely responsible for any NAFTA breaches committed by the State of Mississippi and its judiciary. Article 105 by its terms provides:

> The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

According to the *U.S. Statement of Administrative Action* on NAFTA, Article 105 makes clear that "no country can avoid its commitments under the Agreement by claiming that the measure in question is a matter of state or provincial jurisdiction." H.R. Doc. 103-159, 103d Cong., 1st Sess., v. 2, at 5 (1993). Moreover, according to the United States Trade Representative, "Article 105 . . . mean[s] that the federal government will be held accountable if it cannot secure state or provincial compliance with NAFTA obligations." Letter from Michael Kantor to Hon. Henry A. Waxman, Chairman, Subcomm. on Health and the Environment of 9/7/93, *reprinted in* 1993 U.S.C.C.A.N. 2858, 2862.

170. Article 105 merely codified an established principle of international law:

> The attribution to a federal State of the acts of organs of its component states, in cases where such acts enter into consideration at the international level as a source of responsibility, is also a firmly established principle . . . even in regard to situations in which internal law does not provide the federal States with means of compelling the organs of component states to fulfil international obligations.

[1971] 2 *Y.B. Int'l L. Comm'n* 257; *see also* I. Brownlie, *System of the Law of Nations: State Responsibility, Part I*, at 141 (1983) ("It is well settled that a state cannot plead the principles of municipal law, including its constitution, in answer to an international claim.").

171. The United States for decades has recognized that it is responsible, under international law, for the misconduct of its states. In the *De Galvan Claim* (U.S. v. Mex.), Opinions of the Commissioners 408 (1927), where the United States was held liable for the misconduct of Texas officials, the State Department explicitly refused to defend on the ground that the acts at issue were those of state officials. *See* Political Subdivisions, 5 Hackworth *Digest* § 527, at 593, 595 (1943). The State Department acknowledged that, in its own dealings with nations with other federal systems, "we have invariably insisted on the liability of the Federal Government although the failure . . . was chargeable to the officials of one of the constituent states or provinces." *Id.* at 594.

172. Second, Article 1105 requires the United States to provide "full protection and security" to the investments of Canadian investors. The "full protection and security" standard codifies the settled principle that a state is responsible, under international law, for its failure to exercise due diligence to prevent harms to an alien caused by third parties. *See, e.g.*, *Restatement (Second) Foreign Relations Law of the United States* § 183(b)(ii) (1995); *Restatement (Third) Foreign Relations Law of the United States* § 711(b), cmt. e (1987); 1929 Draft Convention Arts. 10 & 11; I. Brownlie, *supra*, at 161; 8 M. Whiteman, *supra* at 817-18; L. Henkin et al., *International Law: Cases and Materials* 717 (3d ed. 1993). In the *Youmans Claim*, for example, Mexico was held liable for its failure to protect three American citizens from a mob. *Youmans Claim* (U.S. v. Mex. 1926), Opinions of the Commissioners 150 (1927). Similarly, in the

Chapman Claim (U.S. v. Mex), 4 R.I.A.A. 632 (1930), Mexico was held liable for its failure to prevent the shooting of an American.

173. The United States has long respected this principle. For example, the United States paid Italy an indemnity when a New Orleans mob lynched eleven Italian citizens. *See* 6 Moore, *supra*, at 837-41. The United States' official statement observed that although the injury "'was not inflicted directly by the United States, the President nevertheless feels that it is the solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity.'" *Id.* at 840.

174. Just as the United States acknowledged responsibility for its failure to prevent a lynching in New Orleans, it should also be held responsible, under the "full protection and security" provision of Article 1105, for its failure to prevent the gross injustice that Loewen suffered in Mississippi.

VI. CAUSES OF ACTION

175. The causes of action in this case arise under Chapter 11 of NAFTA. Section A of Chapter 11, titled "Investment," imposes on signatory Parties various obligations regarding foreign investors and their investments. Section A includes Articles 1102, 1105, and 1110, the substantive provisions directly at issue. Section B of Chapter 11, titled "Settlement of Disputes between a Party and an Investor of Another Party," creates private rights of action to enforce Section A. Section B includes Articles 1116 and 1117, which create the causes of action directly at issue.

176. In pertinent part, Article 1116 provides that an "investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under" Section A "and that the investor has incurred loss or damage by reason of, or arising out of, that breach."

177. The Loewen Group, Inc. satisfies all of the elements for a claim under Article 1116. *First*, TLGI is an investor of Canada, which is a NAFTA signatory, and of no other state. TLGI's investments in the United States include LGII and, through LGII, Riemann Holdings and Wright & Ferguson Funeral Home. *Second*, as explained at length above, both the United States and Mississippi (for which the United States is responsible) repeatedly breached their obligations under NAFTA Articles 1102, 1105 and 1110 during the *O'Keefe* litigation. *Third*, as explained above and below, TLGI suffered grave damages as a result of those breaches, either directly or through its United States investments.

178. Raymond Loewen also satisfies all of the elements for a claim under Article 1116. *First*, Mr. Loewen is an investor of Canada and of no other state. Mr. Loewen's investments in the United States, through TLGI, include substantial portions of LGII, Riemann Holdings, and Wright & Ferguson Funeral Home. *Second*, as noted above, both the United States and Mississippi (for which the United States is responsible) repeatedly breached their obligations under NAFTA Articles 1102, 1105 and 1110 during the *O'Keefe* litigation. *Third*, as explained above and below, Mr. Loewen suffered grave damages as a result of those breaches, either directly or through TLGI or its United States investments.

179. In pertinent part, Article 1117 provides that an "investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under" Section A "and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach."

180. The Loewen Group, Inc. satisfies all of the elements for a claim under Article 1117. *First*, as noted above, TLGI is a Canadian investor. *Second*, LGII is a United States

enterprise that is a juridical person directly owned and controlled by TLGI. *Third*, as noted above, both the United States and Mississippi (for which the United States is responsible) repeatedly breached their obligations under NAFTA Articles 1102, 1105 and 1110 during the *O'Keefe* litigation. *Fourth*, as explained above and below, LGII suffered grave damages as a result of those breaches.

181. Raymond Loewen also satisfies the elements for a claim under Article 1117. *First*, as noted above, Mr. Loewen is a Canadian investor. *Second*, LGII is a United States enterprise that is a juridical person indirectly owned or controlled, through TLGI, by Mr. Loewen. *Third*, as noted above, both the United States and Mississippi (for which the United States is responsible) repeatedly breached their obligations under NAFTA Articles 1102, 1105 and 1110 during the *O'Keefe* litigation. *Fourth*, as noted above, LGII suffered grave damages as a result of those breaches.

182. Pursuant to NAFTA Article 1121, TLGI, Raymond Loewen, and LGII (as the enterprise) have consented to arbitration and waived their right to initiate or continue proceedings elsewhere. Those consents and waivers are attached to this Notice of Claim at Exhibit 4.

VII. DAMAGES

183. Article 1135 of NAFTA provides that a tribunal may award "monetary damages" and "any applicable interest" and "costs in accordance with the applicable arbitration rules."

184. Under international law, damages must provide "full" compensation for the injuries caused by a State's breach of its legal obligations. F.V. Garcia-Amador, 2 *The Changing Law of International Claims* 579 (1984). The leading damages case holds that a state in breach "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Chorzow Factory Case*

(Ger. v. Poland), 1928 P.C.I.J. (Ser. A) No. 17, at 47; *accord, e.g.*, *Lusitania Cases* (U.S. v. Ger), 7 R.I.A.A. 32, 35-36 (1923) (the "remedy must be commensurate with the injury received" and "must be adequate and balance[d] as near as may be the injury suffered"); *Administrative Decision No. II* (U.S. v. Ger.), 7 R.I.A.A. 23, 29 (1923) ("It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of"); 3 M. Whiteman, *Damages in International Law* 1767 (1943) ("In recent cases, it is frequently stated that the losses sustained are the direct result of the wrong of which complaint is made and that they are therefore allowable.").

185. International law also permits damages for the loss of intangible assets. For example, in determining how to value businesses expropriated by the Iranian government, the Iran-U.S. Claims Tribunal used a "going concern" measure that "encompasse[d] not only the physical and financial assets of the undertaking, but also the intangible valuables . . . as well as goodwill and commercial prospects." *Amoco Int'l Finance v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 270 (1987); *see generally* Aldrich, *supra*, at 247-270.

186. TLGI seeks recovery of the coerced $175 million settlement payment, as well as its other damages, together with interest and costs, including but not limited to:

(a) reduced prospects for corporate investment and growth;

(b) harm to its business reputation;

(c) reduced credit ratings;

(d) increased financing costs; and

(e) other harms.

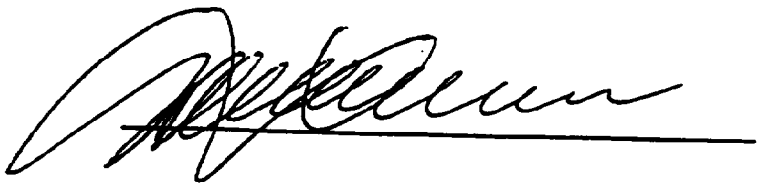
187. Raymond Loewen seeks recovery of his damages, together with interest and costs, including but not limited to:

(a) reduction in value of his TLGI shares attributable to the *O'Keefe* litigation; and

(b) harm to his individual reputation.

ACCORDINGLY, Claimants respectfully request that the Tribunal award them not less than the sum of $725 million in damages, together with interest, the claimants' costs of litigation and attorneys' fees, and such further damages as would be just and appropriate under the circumstances.

RAYMOND L. LOEWEN



I, Bradley D. Stam, have been duly authorized by the Board of Directors of The Loewen Group, Inc. to sign this NOTICE OF CLAIM on behalf of Claimant/Investor The Loewen Group, Inc.

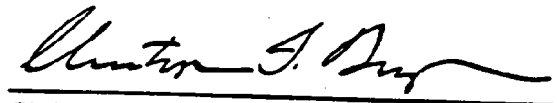
Bradley D. Stam

THE LOEWEN GROUP, INC.

By:
Bradley D. Stam
Senior Vice President, Law

DATED: October 30, 1998

Respectfully submitted,



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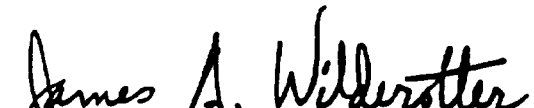

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EXHIBITS

A. Opinion of Sir Robert Y. Jennings, Q.C.

B. Affidavit of Chief Justice Richard Neely

C. Letter to Tribunal from Mississippi Governor Kirk Fordice

D. Summary of Opinion and Curriculum Vitae of Professor Andreas Lowenfeld

E. Stock Market Charts

F. Article 1121 Consent to Arbitration and Waiver of Other Dispute Settlement Procedures

G. Article 1119 Notice of Intent to Submit Arbitration Claim (July 29, 1998)
Affidavit Certifying Service of Article 1119 Notice (July 31, 1998)
58 Fed. Reg. 68,457 (1993) (service address for the United States)
Invitation to Article 1118 Consultation (September 25, 1998)

A

THE LOEWEN CLAIM

Opinion of Professor Sir Robert Jennings, Q.C. on some of the international law aspects of the claim of The Loewen Group to reparation damages for breaches of the North American Free Trade Agreement of 1991 and of the general international law governing State responsibility for the lawful treatment of alien investors.

1. My name is Sir Robert Jennings, Q.C. I am Emeritus Whewell Professor of International Law at the University of Cambridge, England. I am a former Judge and President of the International Court of Justice at the Hague. I am also a former President of the Institut de Droit International. In 1993, I received the Manley Hudson Gold Medal from the American Society of International Law.

2. I am asked by Messrs Jones, Day, Reavis and Pogue, of Washington D.C. for my opinion in the case of The Loewen Group, Inc. (a Canadian corporation), and Loewen Group International, Inc. (The Loewen Group's United States subsidiary corporation) (the two are collectively henceforward "Loewen"), and on their prospects concerning a reparation claim against the United States, under the NAFTA treaty, arising from the proceedings brought against them in a Mississippi State Court by Mr. J. O'Keefe and a number of other associated plaintiffs. Both Loewen and the plaintiffs in the Mississippi proceedings were and are engaged in the funeral homes business. I am assuming that for the purposes of this Opinion there is no need to set out the facts in detail as this has already been done in the Trial Transcript and related pleadings provided to the writer of this opinion. I shall where necessary therefore refer to these sources for the facts and for the trial proceedings, which commenced on 11 September 1995 in the Circuit Court of the First Judicial District of Hinds County, and ended finally on 2 November 1995. It will be convenient first to examine certain aspects of the Loewen claim as a whole.

The General Nature Of The Loewen Claim

3. A crucial point about the claim to arbitration of this potential dispute with the United States is that it would be brought under chapter 11 — the chapter dealing with investments — of the NAFTA trilateral treaty, to which Canada, the United States and Mexico are the sole parties. All three of these parties have a federal system of government. Accordingly it is provided in the treaty that the required standards for the treatment of investments from the investors of other parties apply both to the signatory Federal Government and to States or Provinces, and thus in the present case to the State of Mississippi as well as to the United States itself.

4. The relevant terms of the NAFTA Treaty will be examined below. For the moment it is important to emphasise that a claim brought under the treaty would be a claim against the United States as a party to the treaty. Moreover it would not be a claim forming in any way an appeal from the verdicts and judgment of the Mississippi Hinds County Court, but a new and different claim, not in contract, but for a delictual breach or breaches of the NAFTA Treaty. The Mississippi case would be in issue but only as the facts on which the new claim is based.

5. Furthermore, the claim against the United States, if and when it might be disputed by the United States, would thereupon give rise to a claim by right to the establishment of an arbitration tribunal to try and resolve that dispute; this right to arbitration being based upon alleged breaches of the NAFTA Treaty obligations and standards by the United States. When the arbitration tribunal is established, it will "decide the issues in dispute in accordance with this Agreement and applicable rules of international law" (Article 1131). This provision in my view does not mean that the arbitration proceedings may range over the whole area of state responsibility in general international law but only that part of general international law which is relevant, that is to say 'applicable,' to an alleged breach of the provisions of the treaty by the

United States. There is no doubt room for a broader view of the applicable law remit of an arbitration established under the Treaty and in any case it involves a grey area rather than sharp boundaries. Nevertheless, its possible qualification as suggested above, is a point to bear in mind.

6. It is well to be clear at the outset of this Opinion what will be the juridical character of the claimants' case against the United States. As already mentioned above, it could in no way take on the form of an appeal against the Mississippi decision. The story of the Mississippi decision then becomes simply the factual background of the new case, and the facts upon which the alleged breach of the treaty is founded. This is the position in international law quite apart from the legal fact that the United States Government does not now, I suppose, have any power to reverse or alter the decision of a Mississippi State court. It is necessary therefore to examine the Mississippi case to see how far it forms a basis for an allegation that what happened in Mississippi amounts to a breach of the treaty and/or of the general international law concerning the treatment of aliens insofar as that law is relevant within the meaning and intention of the provisions of the treaty.

The Judgment And The Jury's Verdicts In The Court In Hinds County

7. The Mississippi case in the court below was doubtless one which Mr. Gary for the plaintiffs must regard as one of his greatest triumphs of advocacy of a certain kind. It was a scandalous performance done with great skill, experience and knowingness. From the first moment he made it clear how he was going to play his hand. His two aces were to be (i) the latent prejudice of a small, remote and not at all well-off, African-American community against strangers from a strange land many hundreds of miles to the north of even the north of the United States, and who were moreover 'Canadians'; and (ii) the gratifying self-importance it might lend a jury from such a community if they were given to believe from the outset that this was a very special case involving unimaginable sums of money and that their gratifying role in

the matter was to realize and experience their potential powers to award damages of such amounts as had hitherto been wholly beyond both their experience and even their most unlikely fantasies. (Trial Transcript at 42. 5809 (hereinafter "Tr.")).

8. Counsel for the plaintiffs single-mindedly persevered with these two themes from the first moments of his encounter with the jury, namely in the initial proceedings, before the trial proper started, at the challenging of possible members of the jury, and before any part of the substance of the case should have been put in issue at all. In the challenge procedure Mr. Gary managed to mention that this case "is, for the most part, 75 percent, 80 percent punitive damages" (Jury Selection Transcript at 157 ("hereinafter "Jury Sel. Tr.")); and that a juror should be excused if he or she had a "problem" with punitive damages (Jury Sel.-Tr. at 157-58, 163, 166); and that a juror should be excused if "he couldn't bring back a verdict of 650 million dollars." (Jury Sel. Tr. at 159, 161) This was a truly astonishing beginning to a relatively straight-forward, small-scale contract matter involving total sums of a few million dollars at the most. (Tr. at 665, 677, 2367)

9. Thus, the strongest aspect of any claim on behalf of Loewen for breach of the treaty and of international law, is its sheer, almost bizarre, merit in terms of the intentional flouting of the most ordinary requirements of justice. Of a 500 million dollar judgment in a case involving property and assets in dispute of only a few million dollars, one might almost say res ipsa loquitur. The transcript of the proceedings shows clearly and consistently that the quite ruthless and blatant working up of both racial and nationalistic prejudice, particularly against "Canadians" (that term being used as a self-explanatory pejorative one), was the weapon by which counsel for the plaintiffs was able to bring about the bizarre verdict of the jury. A revealing interlude early in the case was when the respondents understandably objected to two exhibits put in by the plaintiffs: family portraits of the O'Keefes, one of them a large group of several generations of O'Keefes, all the persons depicted in both groups, other than the plaintiff

himself, being persons who were in no way parties to the case. (Tr. at 3-4) The purpose was clear: to bolster the feeling of jury that the plaintiff was "one of our own boys," essentially adopted as a "member" of the African-American community, local for generations, and to be contrasted with Canadians who were none of these things. (Tr. at 3-4) The Judge rejected the objection without giving reasons or attempting in any way to answer the argument presented by the defendants. (Tr. at 4, 6) Later in the trial the Judge stated in the clearest terms that what he called "the race card" had been played. (Tr. at 3595-97) He stated it simply as fact but did not express regret at this state of affairs; nor indeed did he do anything to control the use of the "race card" by the plaintiffs' counsel, or to warn the jury against attaching importance to his persistent theme of prejudice and racial and local fear and suspicion; especially of Canadians — who came all the way from the north to exploit the good people of Mississippi and Hinds County. (*E.g.*, Tr. at 54, 58) One of the most surprising ruses was in the references of counsel to the visit of the plaintiff to one of the defendants in Vancouver. (*E.g.*, Tr. at 63, 64) This visit was portrayed as a wholly unnatural and seemingly rather cruel thing for the defendants to have required of anyone from Mississippi to venture so far. These incidents of a certain kind of advocacy might seem in themselves, and taken in isolation, perhaps even petty; but they serve to illustrate the tone and method of the plaintiffs' case, which was steadily maintained throughout the seven weeks of the hearings, always without any serious attempt by the Judge to control it, or to warn the jury against it.

10. The final stages of the trial became even more a travesty of the elementary notions of justice. The plaintiffs were asking for some 26 million dollars of compensatory damages. (Third Amended and Supplemental Complaint at 79-82) This enormous sum, estimated by the plaintiffs' counsel as mere compensatory damage, was reached by a concatenation of headings of damage, including a series of such headings for breach of contract; also the tort of "fraudulently, maliciously and intentionally interfer[ing] with" a contract

(Jury Verdict Form at 2-3); and breach of contract that "was willful, intentional and intended with such insult, abuse or malice as to amount to an independent tort" (Tr. at 5711; Jury Verdict Form at 3); and "breach of implied covenants of good faith arising out of the . . . contracts" (Jury Verdict Form at 4); and the heads of damage as defined by the plaintiffs' counsel even extended to damages for a supposed antitrust offence (Jury Verdict Form at 7-8). Then there were of course items for "expenses associated with litigation, mental anguish, intentional infliction of emotional distress, and that's awesome in this case, . . . that's awesome in this case" (Tr. at 5543); also the supposed cost of expert witnesses: "You've heard of testimony where even experts have been paid some 40 to 50 million dollars." (Tr. at 5543) (Even had this absurd sum been correct, it could only have referred to experts called by the other side). Counsel for the defendants did indeed make an objection, to which the Judge replied by asking for the basis of the objection. (Tr. at 5543-44) Counsel not unreasonably said the basis was that no witnesses had been paid 40 to 50 million dollars. (Tr. at 5544) The objection was simply ignored and counsel for the plaintiffs merely continued to the jury: "40 or 50 thousand, members of the jury. You heard the experts. You heard their testimony." (Tr. at 5544) And he went back to his initial warnings to the jury that they should ask to be excused if they were uncomfortable "sitting on a case that could exceed 850 million dollars" in damages. (Tr. at 5544-45) (At the beginning of the case he had in fact spoken of 650 million dollars to 850 million dollars. (Jury Sel. Tr. at 17, 18)) By this means Counsel seduced the jury into moving easily between thousands and millions of dollars; both categories way beyond their day to day experience or even imagination. Later he inflated the idea of damages by bringing in seemingly anybody who might ever have dealt with any of the defendant persons or companies involved; for he spoke of "the intentional infliction of emotional distress of 70 some odd million." (Tr. at 5713) Again the Judge made absolutely no attempt either to control Mr. Gary or to correct the impression he was making. Nor did he in his directions to the jury. (Tr. at 5506-38) The

summing up reads like that of an experienced judge, but there was not the slightest attempt to redress or warn the jury against the bizarre untruths and fantasies that had been put to the jury by plaintiffs' counsel. There was not even any reference to the jury of the playing of the "race card."

11. The jury returned a verdict in favour of the plaintiffs under all heads and assessed grossly disproportionate sums of damages under each head. Though relatively modest compared with the 850 million dollars which counsel had been suggesting to them just before they retired (Tr. at 5544-45), and had presented to them as if it were a sum carefully calculated by actuaries (Tr. at 5567-68), the jurors no doubt found themselves easily supposing that the sum they returned in their first verdict ($260 million) was moderate and even cautious.

12. The worst was, however, yet to come. At the very beginning there had been agreement between Judge and counsel on both sides that there would be, indeed had to be, a bifurcated process; which meant that the jury should first return a verdict assessing compensatory damages and that there should be a distinct and later procedure for assessing the punitive damages, if any (Pretrial Proceedings Transcript at 6-7). The Judge now confessed that he had forgotten this requirement. (Tr. at 5752-53) The jury, however, had passed the Judge a note from the foreperson saying that they had not known of this two-step process; and indeed how should they for the Judge had not mentioned it to the jury. (Tr. at 5752-53) They also said they had intended their verdict to comprise $100 million compensatory damages and $160 million punitive damages. (Tr. at 5739) To avoid having a further proceeding the plaintiffs now offered the defendants a settlement for $260 million. (Tr. at 5738) The defendants naturally refused this offer and moved for a mistrial on all issues, stating that the jury had "completely ignored the instructions of the Court, particularly regarding the burden of proof," and that "the verdict on its face evinces bias, passion and prejudice against the defendants." (Tr. at 5738-39) The Judge dealt with this in four words: "That motion is denied."

(Tr. at 5739) He gave no reasons for denying the motion. As it actually happened, the defendants' motion for a holding of mistrial was dealt with in what could hardly have amounted to more than two minutes. The counsel for the plaintiffs did not even intervene before the Judge peremptorily denied the motion. This is hardly due process in any jurisdiction.

13. The upshot was that, after a very confused intervention by the Judge, he decided that the court must now begin the second stage of a bifurcated procedure. So the jury sat again to hear counsel yet again on the subject only of punitive damages. No doubt they now started with the impression that the already outrageous sum of 260 million dollars in total damages in a breach of commercial contract case involving only a few million dollars, was not thought adequate by the court, and they must think again with that sum as only the beginning of their calculations. They were of course left in no doubt that this was the view of counsel for the plaintiffs, who harangued them once more at length.

14. One reason for the return to the question of punitive damages was said to be the discovery that the jury had assessed the punitive damages without having been instructed on the total worth of the defendant company. (Tr. at 5743) This reason was suggested in the absence of the jury by one of the counsel for the plaintiffs and was taken up by their leading counsel who said to the Judge: "We'll just tell the jury, you've given us your decision, but you didn't have certain information. We want you to have it and see if you're still [for] that same verdict or if you want to change it." (Tr. at 5744) Counsel for the defendant then tried to explain to the Judge that there is a different burden of proof for punitive damages (Tr. at 5744); but this was quickly smothered in talk by Judge and plaintiffs' counsel saying, "That was a jury instruction." The Judge immediately agreed: "The jury was instructed." (Tr. at 5745) But the jury instructions contained nothing regarding the burden of proof for punitive damages. The Judge then explained to the jury that "while the Court has accepted the 100 million dollars as

compensatory damages, we are now going to proceed with the punitive damage phase of the trial." (Tr. at 5753)

15. Much of the argument addressed to the jury in this phase was on this question of the value of the defendant company's total assets. According to counsel for the defendants that sum was 411 million dollars; and on that basis he asked the jury whether they might consider reducing the damages below the 160 million punitive damages they had returned at the end of the first phase. (Tr. at 5757) Counsel for the plaintiffs then called a witness, who said he was by profession an economist. (Tr. at 5758) There was a great deal of preparation in asking the witness about his qualifications and asking him to "look at the jury." (Tr. at 5758-59) Then he was asked his opinion on the net worth of "these defendants." He gave the astonishing reply that in his opinion they were worth "a minimum of 3 billion dollars, minimum." (Tr. at 5762) He was then asked to explain to the jury what was meant by "net worth." He replied that "Net worth, from an economist's point of view, is the ability to generate income, how much money this company is worth in the open market." (Tr. at 5762) He then diverted into the net worth of the shares which he put at 1.8 billion dollars (Tr. at 5762); after which he again estimated the net worth of the defendants as, this time, 3.18 billion dollars. (Tr. at 5763) There was then an attempt by counsel for the defendants to get the witness to explain why his net valuation of the shares was grossly in excess of the actual quoted value at the close of the market the evening before. (Tr. at 5763) It appeared that he was going not on the market value but on his ideas about the potential of the defendant company. (Tr. at 5763) The witness was then made to read out the net worth on June 30, 1994 according to the defendants' filings with the Securities and Exchange Commission of the United States, which put the total value of the company at $630,944,000. (Tr. at 5766) But under re-examination by plaintiffs' counsel, the witness was happy to return to his estimate — as an economist — to 3 billion dollars as the future potential of the company. (Tr. at 5766)

16. Plaintiffs' counsel then called another witness to give evidence as an expert economist. Asked to tell the jury his estimate of "the net worth of these defendants" (Tr. at 5768), he remarkably came up with exactly the same estimate as the previous witness: "at least 3 billion dollars." (Tr. at 5769) He then went on to explain that the company accounts, being based on "historical costs, what was originally invested for stuff" was of little use in assessing the potential worth; and he explained that what one needed to look for was not the "book value" but the "market value." (Tr. at 5769-70) The fact that the previous witness, in arriving at the same answer, dismissed the current market value of shares as being of any practical use for the Court's purposes, passed without comment. Counsel for the defendants thereupon recalled one of their own previous expert witnesses, who had been making a further study of the documents in the public domain. His opinion was that the "accounting net worth of the company on June 30, 1995, was in excess of 600 million dollars, but less than 700 million." (Tr. at 5772)

17. After the reading of the Judge's instructions to the jury, pointing out that the purpose of the punitive damages was to punish and to deter (Tr. at 5791), the jury was subjected to another harangue from Mr. Gary for the plaintiffs. The case, he said, "was about greed. It was about powerful people wanting to make it all, they wanted to have it all." (Tr. at 5793-94) Punitive damages were "not designed just to benefit Jerry O'Keefe, it's designed to compel a wrongdoer to not do it again. This is to protect the public, you know, protect those families" (Tr. at 5795-96); a somewhat disingenuous statement considering that the punitive damages would go not at all to the public but to Jerry O'Keefe. He then returned to the plaintiffs' estimate of the worth of the defendant companies and rhetorically juggled with the various mentions of billions. One sample will suffice. After now suggesting to the jury that the punitive damages they might think should amount to one billion, he continued: "And, members of the jury, that number of 1 billion dollars still leaves them 2.1 billion dollars, but you can get

their attention. You can get it, and you've got to get it now, because if you don't, they take a little 160 thousand — 160 million, and they'll pay it and they'll just keep going. They'll just keep doing what they're doing." (Tr. at 5798) In the rebuttal stage he told the jury that "600 - 160 million dollars is peanuts to these people. They spend that a month. You ain't going to do nothing to them by just coming back with 160 million. That ain't what your job is. If you're going to do it, do it. Do the job, do it right." (Tr. at 5808) And so on, playing with great sums in millions and billions as if this was small change to defendants. Finally he worked up to his peroration: "1 billion dollars, 1 billion dollars, ladies and gentlemen of the jury." (Tr. at 5809)

The Mississippi Decision And The Denial Of Justice

18. Loewen's strongest claim against the United States is for Denial-of-Justice. It will be convenient therefore at this point to consider how and to what extent the facts of the present case fit into this concept of international law, which is historically one of the oldest and most respected parts of the system. The NAFTA treaty aspect of this plea will be considered later in this Opinion.

19. There is a preliminary matter to be considered and that is the proper definition of denial of justice in international law. It is possible to find a variety of suggested meanings ranging from the very narrow to the very broad (a convenient summary is in chapter III of Amerasinghe's *Local Remedies in International Law* 1990). One of the narrowest is the traditional South American doctrine that denial of justice is limited to refusal of access to the courts. But the doctrine, certainly as expounded in the United States by both writers and by United States practice, is well expressed by the definition found in the Harvard Law School Research made under the late Professor Manley Hudson, which is as follows:

> Article 9. A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to the courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a

> manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

This is cited with approval in the latest edition of Brownlie's *Principles of Public International Law* 5th ed. 1998 where the learned author (p. 533) states:

> The most controversial issue is the extent to which erroneous decisions may constitute denial of justice. There is authority for the view that an error of law accompanied by a discriminatory intention is a breach of the international standard. (in a footnote he cites Whiteman, viii, 727-31 for this proposition)

It seems clear that the kind of denial of justice which Loewen suffered is, at minimum, that of "a manifestly unjust judgment;" coupled with "gross deficiency in the administration of judicial or remedial process;" and unwarranted "obstruction of access" to the appellate court in Mississippi.

20. It makes no difference that the manifest injustice in this case results from the verdict of a common law jury (a majority verdict of 11 votes out the twelve). (Tr. at 5732-33, 5811-12) It is clear that in the present case the origin of the manifest injustice was in effect created by a gross abuse of the system by plaintiffs' leading counsel, which if not quite aided and abetted by presiding Judge, was at least tolerated and totally uncontrolled by the Judge, even though he knew very well the game that was being played in his court. There were so many occasions when the Judge ought to have stopped plaintiffs' counsel; and occasions when he certainly ought to have warned the jury against counsel's methods. Whatever the reasons for the Judge's silences, and some of his curious utterances, the result was a remarkable travesty of justice. Moreover, the Judge's observation that counsel was playing the "race card," shows that the Judge was wholly aware of what was happening in his court. (Tr. at 3595-97) There are cases where bias, though wrongful, is relatively innocent because it is of the kind stemming from ignorance. This case was different. The jury might have been to some extent unaware of how they were being manipulated. But so far as the court was concerned, both the Judge and counsel knew perfectly well that counsel was intentionally stirring up racial and

nationalistic bias against Canada and Canadians; possibly one must suppose because he had decided that this was the way he might win the case and harvest absurdly and outrageously inflated damages. He also intentionally befuddled the members of the jury with large sums, changing sometimes in a sentence from millions into billions, and adding words to the effect that "these people" spend this sort of money in an afternoon. It was a remarkable but most unsavoury performance.

21. But the most telling aspect of this case is not the way the jury's verdicts were brought about but the verdicts themselves. The sums awarded were so bizarrely disproportionate as almost to defy belief. To begin with, the sum of 100 million dollars "compensatory" damages awarded in a relatively straightforward and routine breach of contract case, that on the face of it involved at the outside, and assuming a finding wholly for the plaintiff, certainly no more than a few million dollars, and probably significantly less, was in itself massively disproportionate. Having decided that sum, the jury then went on to assess punitive damages at 160 million dollars. The second phase allowed counsel to mesmerise the jury into changing their own already grossly exaggerated sum of $160 million punitive damages into $400 million. In terms of denial of justice these astonishing figures speak for themselves. These verdicts were brought about by carefully calculated, and wholly improper means. The gross denial of justice was the intended result.

22. There is one other aspect of the Mississippi proceedings to mention: the question of what the punitive damages were supposed to be for. The reason given by counsel and the court was to punish and prevent any further such activities by the defendants. (Tr. at 5755, 5791) Basically it can only have been to punish and deter for the future any like breaches of contract. There was no evidence at all of any conduct by the defendants which might as it were aggravate the breach of contract, even assuming there was a breach of contract. In terms of NAFTA's policy of encouraging investment, it is difficult to think of anything

more likely to be against the letter and spirit of the treaty than unexplained immense punitive damages for a breach of contract involving relatively small sums of money.

The Local Remedies Rule ("LRR")

23. The concept of denial of justice is very closely related to the rule of international law requiring exhaustion of local remedies before intervention to protect a national allegedly harmed in another country may validly be instituted, whether diplomatically or by legal process. In relation to denial of justice it may be expressed by saying that in international law there can be no denial of justice *until* the local remedies have been exhausted. The *rationale* of the rule is variously explained but essentially it is that an adequate municipal court remedy is the norm and one should therefore try this first before transferring to the international sphere on a different though related international law case against the government for an international delinquency. This rule, in the present case, raises the question of resort to the Mississippi Supreme Court; and there is also to be considered the closely related matter of the settlement entered into by Loewen. There are several observations to be made on this rather technical but important question, which is notoriously full of possible pitfalls. (For a rather splendid commentary of a few pp. see the UK pleading in the *Finnish Ships* case arbitrated in 1932, conveniently to be found in BYIL XVII, 1936, at p. 22 of an article by Fachiri). The present case is an unusual one in that the municipal proceedings in question were brought with the present complainant as *defendant*; far the greater part of the precedents were cases initiated in the local courts in which the person complaining of a breach of international law was the plaintiff.

24. Perhaps the first thing to say is that the local remedies in the present case have in fact been exhausted. Resort to the local court of appeal was made unreasonable by the refusal to modify the bond requirement which in this case amounted to economic duress; and be it noted in a change of mind of the Mississippi Supreme Court which was at first minded to

modify the required bond, so there can have been no legal obstacle to modifying it to make an appeal possible.

25. Second, the NAFTA Treaty has dispensed with the local remedies rule for cases brought under the treaty. This is indeed the plain policy of the treaty; a policy becoming more and more common when international law remedies are themselves becoming more common and better known.

26. A third reason why the local remedies rule is not applicable here — quite apart from what must be the main one that the local remedies were in fact exhausted — is to be found in the terms of the NAFTA Enabling Act, which in sec. 102(c), precludes, in the local law, any private law suit or right of action "against a federal, state or local government ... based on the provisions of the NAFTA." This of course refers not to the Mississippi contract case but to the new case based upon NAFTA and international law, to which the Mississippi case is simply the background facts. But it is that original contract case to which the LRR applies. When the new case against the United States for denial of justice is instituted by notice under the terms of the treaty, the notice will presumably contain the undertaking required by the Enabling Act as it were to abandon any and all local or indeed other remedies. This, together with the fact that local remedies were in effect denied, finally by the Mississippi Supreme Court, seems to dispose of any possible difficulties with the local remedies rule.

The Settlement

27. The Settlement entered into by Loewen and no doubt registered with the court can in no wise be regarded as a settlement or waiver of Loewen's claim against the United States. That will be in form and in substance a wholly different claim from the one which was settled in the Mississippi court. That settled claim was about a contractual relationship governed by the law of Mississippi and the other involved party was the plaintiffs in the Circuit Court of Hinds County; the claim now under discussion will be a claim against the United States

for denial of justice and it will be governed by the NAFTA treaty and by the relevant rules of general international law.

28. The main question about the settlement therefore is whether it might be regarded as having disposed of the possibility of a complaint of denial of justice in the Mississippi proceedings; that is to say the factual basis of the allegation of a denial of justice for which the United States is claimed to be responsible. But the settlement was clearly made under economic duress by reason of the Mississippi Supreme Court refusing to reduce to a reasonable sum the bond requirement for appeal. Loewen was put into the position of having to choose between accepting the terms of the settlement or going into liquidation. In short the position is that the settlement, having to be made under duress, has itself become a basis for the Loewen claim. It is part and parcel of the denial of justice for which the United States is responsible in international law. The settlement is also relevant to the question of the measure of damages; but that will be looked at below.

Some Aspects Of The NAFTA Treaty Provisions

29. It is important obviously to bring the Loewen case well within the provisions of the NAFTA treaty as this is the only source for being able to assert a right to have the matter submitted to an international arbitration.

30. First, there is the broadly drafted Article 1105 to consider. This article provides for the treatment of investments in accordance with the *Minimum Standard*; and to establish what is meant by the minimum standard it has to refer to general international law which has long traditionally defined the requirements of a minimum standard for the treatment of aliens — the treatment of aliens generally and not only in terms of investment. The article in paragraph 1 provides:

> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

This is an important provision of the NAFTA Treaty, for it refers without qualification to the general international law governing the treatment of aliens, and to its minimum standards to be found in the large jurisprudence on that subject. To be sure, there is indeed a minimum standard and the cases show that generally speaking it has been applied when the treatment of an alien has been outrageous and so without any doubt a breach of a minimum standard. But the present case is such a one. No reader of the transcript of the Mississippi trial could fail to understand that this whole episode was outrageous from beginning to end; and must be without doubt a breach of the minimum standard required both by international law and by the NAFTA Treaty.

Expropriation

31. It is necessary also to consider specifically Article 1110 which deals with "Expropriation and Compensation." The facts of the present case do not show an expropriation in the usual sense of a general enactment or decree which appropriates to the State a certain category, or categories, of alien property or investment. Nevertheless there has been in effect an expropriation of Loewen's property by the vehicle of the bizarre trial falling far below any possible standard when judged by international law, or indeed by the NAFTA treaty. This expropriation is another aspect of the denial of justice.

The NAFTA Treaty Standards Of Treatment Of Alien Investors

32. Article 1102 of the NAFTA treaty is also a basis for the Loewen claim. It has three paragraphs, each of which calls for separate consideration. Paragraph 1 provides:

> Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

This reference to the national standard recalls the classical controversy between North and South America, and indeed Europe over this standard and whether it was acceptable as part of

international law. The *Calvo* clause was an attempt to write the standard into investment agreements. It is therefore not surprising to see that it survives in this treaty as *one* of the standards laid down. The interesting feature of the Loewen case is that it is a straight and undeniable breach of even the national standard. The endeavour of Mr. Gary, plaintiffs' leading counsel was, throughout the trial, to draw a clear distinction between the treatment to be accorded to "our boys" and the treatment suitable for those "Canadians" coming from the remote north to exploit the people of that district of Mississippi.

Paragraph 2 of the same Article is a like provision but in respect this time not of the investors but of the investors' investments.

Paragraph 3 is pertinent to the present case because it makes it wholly clear that the like standard of treatment must be accorded also "with respect to a state or province."

The treaty provides three standards of treatment — all well-established in the practice and the jurisprudence of international law, the antidiscrimination standard (Article 1102), the most-favoured nation treatment (Article 1103); and the minimum standard (Article 1105). The latter has already been looked at above. But the way the imposition of the standard is expressed in the text of this article is important. It refers to "treatment in accordance with international law, including fair and equitable treatment and full protection and security." It thus imports without qualification the entire general international law concerning this standard. In the second paragraph the word "measures" appears again in "measures it [a Party] adopts and maintains;" but the important first paragraph is not qualified in this way, and clearly is not confined to "measures," whatever that might mean.

The Question Of Damages

33. The basic principle governing the measure of damages in international law is the one expressed famously in the *Chorzow Factory* case, 1928 P.C.I.J. (Ser. A) No. 13, that the applicant should, so far as possible be put into the position *quo ante*; and where this is not in

fact possible the sum of damages should, so far as is possible by payment of money, put the applicant in a position corresponding to that he would have enjoyed if the wrong had not been committed. In short, the governing principle of damages in international law is the *restitutio in integrum*, using money damages wherever the actual restitution is no longer possible.

34. The other damage question that springs to mind is the legal position of the jury's verdicts in the international law claim. Of course the whole Mississippi proceeding is tainted with illegality in international law and in particular in the context of the obligations of the United States under the NAFTA treaty. The United States is under an obligation in international law to restore Loewen into the position it would be in were it not for the Mississippi miscarriage of justice.

35. Was the verdict finding a breach of contract a reasonably possible verdict, or was it manifestly a perverse verdict? There is some authority for treating the Mississippi verdict as itself improper. Thus O'Connell (p 1116) says that "Where the wrong consists of an act of legislation or a judgment of a court reparation may take the form of declaration that the act or judgment be annulled." And in the footnote he cites the *Martini* claim *(Italy v. Venezuela)* 1930 UN Rep. II, 975; and Eagleton, *The Responsibility of States in International Law* (1928) Chap.8. That approach seems appropriate here, for the prejudicial anti-Canadian evidence admitted at trial infected the jury's liability determination as well as its assessment of damages.

36. But there is an additional complication: the proper procedure for redressing what one considers to be a mistaken verdict, is the appeal to the Court of Appeal. This was in realistic terms refused by the rejection of the motion to reduce the necessary bond; a particularly ironic situation when the main, and obvious ground of appeal would have been, quite apart presumably from the question of breach of contract or no, the manifestly absurdly inflated damages awarded. This is therefore the head under which I would have thought it

would be possible and reasonable to include a sum of damages for the losses stemming from what was in effect a deprivation of the right of appeal.

The Question Of The Claim For The Shareholders' Losses

37. I know of no reason in principle why there could not be a claim on behalf of the shareholders of Loewen. Suffice to say that there is of course quite a lot about the rights and losses of shareholders in the *Barcelona Traction* case (ICJ Rep. P.3). This was a claim by Belgium for the losses suffered by Belgian shareholders in a Canadian company which was made bankrupt in suspicious circumstances by a remote, small town court in Spain; as a result of which a Spanish gentleman acquired the company at what seemed a bargain price. The claim failed owing to questions about the locus standi of Belgium to exercise its rights of diplomatic protection in respect of a Canadian company. The Court took a very conservative approach in refusing to go behind the corporate veil. Nevertheless the position of a claim founded upon the provisions of the NAFTA treaty, and brought by the investors, as they are entitled to do under the provisions of that treaty, is a quite different legal situation. Under the wording and structure of NAFTA, the *Barcelona Traction* impediment is effectively removed, allowing the shareholders to make a fair and equitable claim.

Conclusions

38. The proceedings and decisions in the Hinds County Court amount, in my opinion, to a clear instance of Denial of Justice in the form of, to use the Harvard Research definition of denial of justice in international law, a manifestly unjust judgment; gross deficiency in the administration of the judicial process; and failure to provide those guarantees which are generally considered indispensable to the proper administration of justice. The sums of damages awarded of $100 million compensation damages and $400 million punitive damages are so ludicrously disproportionate to the actual modest value of the invested interests involved as to speak for themselves in terms of an extreme example of denial of justice.

39. These facts also constitute a breach of the NAFTA Treaty provisions on the protection of the investments and the investors of one Party in the territory of another. In particular, it constitutes in express terms several times repeated, a breach of the requirement of national treatment (Article 1102), for the jury in the case were repeatedly told to be mindful of a distinction between local people and such people as "Canadians;" second it constitutes a breach of even the minimum standard for the treatment of aliens required by international law and by Article 1105 of the NAFTA Treaty, for the treatment accorded in this case was truly outrageous even by the minimum standard. Furthermore, Article 1105 of the Treaty elaborates the minimum standard by reference to international law and "including fair and equitable treatment and full protection and security," and also "non-discriminatory treatment."

40. Loewen nevertheless rightly attempted to seek local redress and to exhaust local remedies by appeals to the Mississippi Supreme Court. But the local law requires an appellant to deposit a bond of 125% of the damages. This, in view of the absurd damages awarded would have amounted to $625 million: about the total amount the company was worth; so in effect it was being required to go in liquidation. The Supreme Court of Mississippi had the power to reduce the bond requirement but ultimately refused to do so. It is clear therefore that, in international law Loewen has exhausted the local remedies available to it.

41. In the event of resort to international arbitration under the NAFTA Treaty, Loewen would be required to waive resort to any tribunal other than the one set up under the treaty. (Article 1121)

42. The Loewen claim will presumably be submitted to the United States Government. The treaty requires that "the disputing parties should first attempt to settle a Claim through Consultation and Negotiation." (Article 1118)

43. If the United States disputes the claim, then there is an "investment dispute" which can be made the subject of the treaty arbitration procedures. (Article 1115)

44. Loewen has then a right to arbitration.

45. This investment dispute to be submitted to arbitration is not of course in any way an appeal from the Mississippi court decisions. It is not a dispute in the local law of contract with the local plaintiffs in the Mississippi case, but an investment dispute between Loewen and the United States, governed by international law and the terms of the NAFTA Treaty. The Mississippi proceedings are merely the facts on which the new case is based.

46. The settlement accepted by Loewen in the Mississippi court was not, and cannot be viewed as a settlement of the different matter of the claim against the United States. It was made under economic duress, for Loewen had no alternative but to accept it, having been forcibly deprived of any realistic possibility of appeal. In fact, the circumstances of the settlement are an integral part of the complained denial of justice.

47. The measure of damages to be claimed from the United States is in international law, *restitio in integrum* and, insofar as that may not be possible, restitution as far as money can do it to the position the party would have been in but for the international law and treaty wrong.

R.Y. Jennings
26 Oct. 1998

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA-- to wit

AFFIDAVIT

Before the undersigned authority, an officer authorized to administer oaths, appeared Richard Neely, Esq., who upon his oath deposes and says:

I am Richard Neely, a member of the bar of the State of West Virginia admitted to practice in 1967. I am a 1967 graduate of the Yale Law School, and I served as a member of the West Virginia Legislature from 1971 to 1973. In 1972, I was elected to the West Virginia Supreme Court of Appeals on which I served as a justice and chief justice from January, 1973 until I retired in April, 1995. I currently hold the West Virginia constitutional office of "retired judge" and I am eligible to serve as a judge in any court in the State of West Virginia if and when I cease the active practice of law. I have written seven books, of which five are concerned with the way political and economic forces influence court decisions. The books that bear most directly on the matters discussed in this affidavit are *Why Courts Don't Work*, McGraw-Hill (New York, 1983) and *The Product Liability Mess*, The Free Press (New York, 1988).

I was legal advisor to John Paul Vann in the Republic of Vietnam in 1968-69. I was a visiting professor of law in 1984 at Fudan University in Shanghai, and during that visit I studied the Chinese law concerning protection of foreign investment. Between 1983 and 1997 I regularly spent between five and seven weeks a year in Europe where I observed the European

Community. I have reviewed relevant materials concerning the concept of denial of justice under international law.

I both acquired and retained my judicial office through state-wide, partisan elections. Thus, I have won four state-wide elections and I am intimately familiar with the ways in which elected judges handle the dual demands of honest adjudication and political self-preservation. After retiring from the West Virginia Supreme Court of Appeals, I returned to the full-time practice of law where I largely represent plaintiffs and am paid through contingent fees. I am also a member of the Association of Trial Lawyers of America, the organization comprised primarily of plaintiffs' lawyers that advances the interests of those lawyers and their clients on all fronts. Although I understand that The Loewen Group may not entirely share my view, I consider punitive damages to be, as a general matter, an appropriate exercise of judicial power, if reasonable in amount and awarded in a manner consistent with due process and basic principles of fairness. My complete resumé is attached hereto as Exhibit A.

I have been asked to determine to a reasonable degree of jurisprudential certainty whether The Loewen Group and related defendants were the victims of anti-Canadian discrimination and a "complete denial of justice" in the case of *Jeremiah J. O'Keefe, Sr., et al. v. The Loewen Group, Inc., et al.*, Civil Action No. 91-67-423 tried in the Circuit Court of the First Judicial District of Hinds County, Mississippi. In arriving at my conclusions in this regard, I have reviewed the following materials: (1) the transcript of the proceedings in the Hinds County Circuit Court; (2) the file containing pre-trial and post-trial motions and supporting memoranda; (3) the *Mississippi Rules of Appellate Procedure*; and (4) the orders of the Mississippi Supreme Court relating to the *O'Keefe v. Loewen* case. I have consulted

Luther T. Munford's treatise, *Mississippi Appellate Practice*. In addition, I have traveled to Jackson, Mississippi where I interviewed members of the bar and former judges of the Mississippi Supreme Court.

Based upon: (1) my review of the record and other materials cited above; (2) my twenty-two years of experience as an elected state supreme court justice and chief justice; and (3) my years of research into the sociology of judiciaries, I conclude to a reasonable degree of jurisprudential certainty that the Defendants in *Jeremiah J. O'Keefe, Sr., et al. v. The Loewen Group, Inc., et al.*, were subjected to invidious discrimination because they were Canadians and were subjected to a complete denial of justice as that term is traditionally used in international law. *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, (Harvard Law School), 23 Am. J. Int'l L. 133 (Spec. Supp., 1929). Indeed, even for a plaintiffs' lawyer like me, the case of *O'Keefe v. Loewen*, from beginning to end, descends to the level of a mockery of justice.

1. <u>The Nature of the Mississippi Judiciary</u>

The judges of the Mississippi judiciary are elected on a non-partisan ballot, i.e., a ballot that does not identify them with a particular political party. Trial court judges are elected for four-year terms and supreme court justices are elected for eight-year terms. The shift to non-partisan elections has occurred only in the past five years; previously, judges were elected on a partisan basis. Although this shift to "non-partisan" elections would appear to be an advance for independence and integrity in the judiciary, the non-partisan election of judges has had the exact opposite effect. Partisan elections allowed judicial philosophies to be conveyed in the shorthand of party affiliation. Crude as the philosophical differences between Democrats and Republicans

may be, party preference still gave a base to nominees and tempered the effect of money in elections. Now, however, there is no way for a judge to inspire support except through paid political advertising-- a phenomenon that substantially increases the influence of those capable of making contributions.

Furthermore, judicial elections are not immune to the polarization between blacks and populists on one side and conservative whites and business interests on the other that pervades Mississippi politics in general. Indeed, this polarization appears to be leading to contested judicial races as a matter of course. Both plaintiffs' lawyers and defense lawyers with whom I have talked agree that judicial races are increasingly taking on the characteristic of a competition between the plaintiffs' bar and the defense bar. The populist disposition of juries in many Mississippi judicial districts makes Mississippi an attractive venue for high-stakes tort litigation and, accordingly, makes Mississippi Supreme Court judicial races increasingly high-stakes affairs. Yet for the average voter, judicial races are a crashing bore; the focus of public comment is almost always on criminal cases. Favorable free publicity is seldom available, but for an incumbent who attempts to dispatch his or her duties with integrity, there is always abundant unfavorable free publicity, particularly when criminal cases are reversed.

Mississippi Supreme Court justices are elected from three judicial districts. With the advent of non-partisan elections, Mississippi Supreme court justices are entirely dependent for their continued job tenure upon two related things: (1) a justice's ability to raise money at election time; and (2) a justice's skill in avoiding decisions that create enemies willing to give money to opponents.

The Mississippi election law allows unlimited contributions from individuals but limits

corporate contributions to $1,000. I spent twenty-two years as an appellate judge, and during those years I often attended meetings with other elected appellate judges from outside West Virginia. In general, the experience of all elected judges is roughly similar. In my experience, the lawyers who regularly represent plaintiffs in personal injury, class action and toxic tort cases contribute handsomely to judicial campaigns. A judge can allow a plaintiff's lawyer to retire early in life on a handsome income with one discretionary ruling! When multi-million dollar judgments are involved, a judge's decision not to set aside a punitive damage award may make a plaintiff's lawyer millions of dollars after taxes.

The defense bar, on the other hand, are poorly paid in comparison to competent plaintiffs' lawyers and, unlike plaintiffs' lawyers, are seldom paid based on the results they achieve. Rather, defense lawyers are paid based on hourly charges-- a system that guarantees a decent upper middle class wage but fails to give defense lawyers any personal stake in the outcome of the cases they try. Although the defense bar can put together numerous modest and reluctant contributions, the plaintiffs' bar will cheerfully provide large individual contributions to their friends on the bench.

The political dynamics of different sides of the bar having wildly different personal stakes in the outcome of litigation are usually kept within acceptable limits when all the litigants in the court of an elected judge are from the same state. Consistent outrageous treatment from the same judge will eventually overcome parsimony even among defense lawyers and lead to . . retribution. And, although the defense bar are reluctant political contributors, their clients often are not; local business interests frequently support pro-business local judges. But the normal political checks and balances that are present in routine litigation are absent in a case like

O'Keefe v. Loewen: the defense lawyers were not regular victims; Loewen was not a regular litigant; and, Loewen had no significant local constituency of dependent wage earners and contractors.

Although roughly twenty-four states have elected judiciaries, few states have the type of racial polarization that burdens Mississippi. (For example, Mississippi is one of the few American states that is under the Federal Voting Rights Act; this means that notwithstanding state sovereignty, the State of Mississippi can make no change in voting districts or the method of voting without permission from the U.S. Department of Justice.) Thus, in *O'Keefe v. Loewen*, there was one further political eccentricity in the judge selection process that inured to Loewen's detriment: Hinds County, Mississippi, by virtue of the Federal Voting Rights Act, is under a U.S. District Court order in *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss., 1988) that divides the County into single-judge districts for election purposes to enhance the power of black voters. This, then, leads to a pattern of two white and two black circuit court judges, each with county-wide jurisdiction. Judge Graves, who presided in *O'Keefe*, was and will be elected from a deliberately gerrymandered black voting district (*see, Martin v. Mabus*) where the likelihood of political retribution from the predominantly white business community is vanishingly small, but in which association with a popular, theatrical and successful lawyer like Willie Gary is a valuable asset.

2. The Effect of the Judge Selection Process on *O'Keefe's* Outcome

During the course of the *O'Keefe v. Loewen* trial, the Plaintiffs' lawyers reiterated three themes that had the effect of inflaming the passions of the jury, namely race, wealth, and many of the defendants' Canadian citizenship. Attached hereto as Exhibits B, C, and D respectively are

tables listing the Plaintiffs' lawyers' references to race, wealth, and Canadian citizenship. Each such reference is identified by specific page(s) and line(s) in the trial transcript. Standing alone, no single invocation of one of these themes indicates a denial of justice, but when the regular invocation of these themes is combined with the way in which the trial judge handled the issue of punitive damages, it becomes apparent that Loewen was targeted for a plundering.

This conclusion is reinforced by the fact that in plundering Loewen, the trial judge did not even bother to give the appearance of propriety or attempt to protect his record. For example, *Miss. Code* 11-1-65(f) extends to defendants who have had punitive damages awarded against them the right to certain judicial procedures on a motion for reduction of excessive assessment of punitive damages. (Regardless of whether *Miss. Code* 11-1-65(f) technically applies to *O'Keefe* because of the date on which *O'Keefe* was filed, the procedure the statute mandates simply instantiates into Mississippi statutory law standards already applicable under the U.S. *Constitution's* "due process" clause as articulated in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and subsequent cases.)

Basic fairness, to say nothing of maintaining the appearance of propriety, demands consideration by the trial court of a defendant's motion to reduce excessive punitive damages before entry of judgment, and in a case of *O'Keefe's* magnitude, the same rules of basic fairness demand that the defendant be accorded a full hearing. However, notwithstanding Plaintiffs' receipt of Defendants' Motion for Reduction of Excessive Assessment of Punitive Damages, Plaintiffs presented a form of final judgment to the trial court in the early afternoon of 6 November 1995 and failed to provide a copy to the Defendants. (Motion for Judgment Notwithstanding the Verdict and/or in the Alternative, for a New Trial and/or, in the Alternative,

for a Remittitur at 81-82, [hereinafter "JNOV Mot."]) On that same afternoon, the trial court entered judgment with no apparent consideration of Loewen's Motion for Reduction of Excessive Assessment of Punitive Damages.

Similarly, Rule 54(c) of the *Mississippi Rules of Civil Procedure* provides:

> (c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; *however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.*

[emphasis added]. This Mississippi Rule 54(c) is different from its counterpart in the *Federal Rules of Civil Procedure*. Mississippi does not allow a monetary judgment greater than that requested in the pleadings; in *O'Keefe v. Loewen* the Plaintiffs had asked for roughly $26 million in compensatory damages-- an amount that on its face was grossly inflated by double counting. *See,* Third Amended Complaint at 79-82.

Yet notwithstanding Mississippi Rule 54(c), the judge, based solely on a note from the jury foreman, and after overruling Loewen's motion that the jury itself be polled, concluded that the jury had awarded $100 million in compensatory damages, an amount roughly four times the amount prayed for in the complaint. This, however, was not an insoluble problem; traditionally the way around a failure to ask for as much money as the jury actually awards is to amend the pleadings after the conclusion of the evidence. Yet in Loewen's case Plaintiffs had so little fear of reversal and so little concern to maintain the appearance of propriety that they moved only orally, during the hearing on Loewen's JNOV Motion, to amend the pleadings, and then only because the judge suggested that such an amendment might be proper. Ironically, however, the

judge never granted the motion!

3. The In-State versus Out-of-State and Out-of-Country Paradigm

In my book, *The Product Liability Mess*, I explored at length how substantive law is influenced by the profile of litigants. For example, in product liability law the typical profile of the players involved in the litigation is as follows: (1) an in-state plaintiff; (2) an in-state lawyer for the plaintiff; (3) an in-state judge; (4) an in-state jury; and (5) an out-of-state defendant. Most of the products we all consume are manufactured outside our own states-- something that is obviously true in states like Mississippi and West Virginia, but is also true even in big manufacturing states like New York and Illinois.

In product liability law there is absolute liability without fault. Indeed, product liability law allows the fewest defenses to a defendant of any area of tort law except the law of ultra-hazardous activities (§519 *Restatement (Second) of Torts.*) From my judicial experience, I have concluded that the reason for product liability's Rhadamanthine anti-defendant rules is the recurring in-state plaintiff *versus* out-of-state defendant profile: A state court that refuses to imitate the most pro-plaintiff product liability law simply penalizes its own citizens to enrich out-of-state manufacturers. A jurisdiction's own manufacturers (who employ workers and pay taxes in the forum jurisdiction) will seldom, if ever, be sued for defective products at home.

What leads to a competitive race to the bottom in product liability law is that the judiciaries of other states are unimpressed by any restraint of a defendant manufacturer's own home state's judiciary towards out-of-state manufacturers. This dynamic, then, leads to ever more pro-plaintiff law where each state redistributes wealth from manufacturers in other states and foreign countries to its own citizens at absolutely no political cost. And, because the same

dynamic that applies to courts' decisional law also applies to legislatures' statutory law, there is no possibility of reforming product liability law elsewhere than at the national level.

A similar problem would occur with the state taxation of activities in interstate commerce were it not that the Supreme Court of the United States has greatly circumscribed this opportunity for state and local government to plunder out-of-state residents. Since early in the 19th century, the Supreme Court of the United States has used the U.S. *Constitution's* "Commerce Clause" to invalidate state taxes on interstate activity unless the taxes are fairly apportioned and administered in a non-discriminatory way.

In my experience, however, the Supreme Court of the United States is a slender reed on which to rely for protection of out-of-state defendants from the clutches of local judges and juries when those local judges and juries decide to plunder an out-of-state defendant. That, then, is why stronger guarantees of substantial justice than are offered by traditional American domestic law must be provided to citizens of foreign countries who have little or no opportunity to defend themselves politically in the United States. The NAFTA Treaty, then, in addition to the general guarantees of international law, also gives specific assurances that citizens of the treaty countries will be accorded substantial justice in all other treaty countries.

In *O'Keefe v. Loewen,* the hostility of the trial court to foreign-owned Loewen was palpable throughout the trial, and the trial court's mockery of justice was confirmed when the judge "reformed" the initial jury award of $260 million (which included both compensatory and punitive damages) and arbitrarily allowed $100 million to stand as "compensatory" damages while remitting the other $160 million subject to further instructions to the jury and their consideration of punitive damages. (Tr. at 5739-43, 5753) Traditionally, a jury error of this type

would result in a mistrial or, at a minimum, require the complete reinstruction of the jury and further deliberations pursuant to the court's instructions. In *O'Keefe v. Loewen*, however, it is obvious that the Court wanted to signal the jury that $160 million in punitive damages was not enough, and the jury in rapid course picked up on the signal and awarded $400 million in punitive damages.

4. The Timidity of the Mississippi Supreme Court

O'Keefe v. Loewen is not the only case ever tried where the judge favored one side, nor is it the only case ever tried where the lawyers were allowed to make blatant appeals to racial, populist, and anti-foreign sentiments; certainly, *O'Keefe v. Loewen* is not the only case ever tried where the jury was swayed by passion and prejudice. However, *O'Keefe v. Loewen* is one of the few cases anywhere in the lore of the law where politically timid appellate judges were able, by deft manipulation of a facially neutral bond requirement, to avoid entirely the politically unpalatable task of reviewing a popular local verdict. There were manifold errors in the trial of this case, many of which rose to a constitutional level under the *Constitution of the United States*, yet the Mississippi Supreme Court succeeded in avoiding both the political liability of reversing the judgment itself and, at the same time, competently foreclosed any meaningful further appeal to the Supreme Court of the United States!

The Bond Requirement

Until 1975 and the case of *Newell v. State*, 308 So.2d 71 (Miss., 1975), Mississippi procedural law was governed by a host of statutes that were frequently inconsistent with modern American jurisprudence. In *Newell*, the Mississippi Supreme Court said that "separation of powers" principles specifically articulated in the *Constitution of the State of Mississippi* required

that the Mississippi Supreme Court control the procedural law of the State. Thereafter, the Mississippi judiciary, helped by the able work of bar committees, modernized Mississippi's jurisprudence though the promulgation of rules; nonconforming statutes, even though not repealed, were committed to the dustbin.

In the tradition of these old statutes, Mississippi still has a statute that provides for an automatic stay pending appeal upon the posting of a bond equal to 125 percent of any money judgment. This 125 percent figure is in the law in part because Mississippi imposes a 15 percent penalty on losing appellants to discourage frivolous appeals; the difference, then, between the 115 percent representing the judgment plus the penalty and the 125 percent required in the bond is an attempt to protect interest. However, already in *Henry v. First National Bank of Clarksdale*, 424 F. Supp. 633 (N.D.Miss.1976) aff'd, 595 F.2d 291 (5th Cir., 1979), the federal courts held that Mississippi's 125 percent bond requirement could be unconstitutionally applied to deprive litigants of due process.

After *Henry*, in 1987, when Mississippi adopted the *Mississippi Supreme Court Rules*, discretion was extended to both the trial court and the Supreme Court under Rule 8(b) to waive the bond requirement for good cause shown. Indeed, the intent of the new Rule 8(b) appears to me to have been to protect defendants like Loewen and the defendants in *Henry* who are unable to post the 125 percent bond. In other words, Rule 8(b) was calculated to give litigants a way to get a bond reduced that would be easier than constitutional adjudication in the federal courts. *See*, Official Comment to *Miss. R. App. Pro.* 8(b); former Rule 73, *Fed. R. Civ. Pro.* (allowing reduction in bond for "good cause"); Luther T. Munford, *Mississippi Appellate Practice* § 8.3 (1997). Therefore, the Mississippi Supreme Court had discretionary authority under its own rules

of appellate practice to waive the requirement that Loewen post a $625 million bond as a condition of a supersedeas pending appeal.

Error in the Record

The Supreme Court of the United States has indicated in a line of recent cases that the power of states to impose punitive damages is not unlimited and that meaningful, post-verdict review of punitive damage awards according to reasonable standards is a condition precedent to the legitimacy of such awards. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) [I wrote the state court opinion in *TXO* which was affirmed by the U.S. Supreme Court on appeal]; *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

One element that must be considered by both the trial and appellate courts in determining whether to sustain a punitive damage award is the "reasonableness" of the award, and part of "reasonableness," as that term has been interpreted by the U.S. Supreme Court, involves whether the award is disproportionate to the Defendant's wealth. Loewen was able to show at trial that its total net worth (according to its published financial statements of 30 June 1995) was "in excess of $600 million but less than $700 million" (Tr. at 5772), which meant that the punitive award alone was roughly 57 to 67 percent of the company's net worth. Indeed, Loewen's accounting net worth is a better indicator of its financial position and capabilities, and that was only $631 million according to its 30 June 1995 financial statement; the punitive damages, as measured by that standard, were 63 percent of the company's net worth.

In *O'Keefe v. Loewen*, the trial court's award of $100 million in compensatory damages exceeded by almost four to one the $26 million in compensatory damages requested by the

Plaintiffs in their last complaint. The award of $400 million in punitive damages was more than fifteen times the compensatory damages originally requested, and Loewen submitted affidavits and argued that payment of such an award would almost certainly result in bankruptcy proceedings. (Motion for Stay at 8, Exhibits E, F, and G.)

Therefore, the Mississippi Supreme Court, on the issue of punitive damages alone, would have been compelled to remit or reverse. Indeed, given the size of the judgment, it is my opinion that failure to remit would likely have prompted reversal by the Supreme Court of the United States. Furthermore, the myriad other errors committed by the trial court, including, but not limited to: (1) failure to instruct the jury at all on the difference between the "clear and convincing evidence" required for an award of punitive damages *versus* the "preponderance of the evidence" required to establish liability for actual damages; (2) failure properly to reinstruct the jury after it returned the original erroneous verdict; and (3) the admission of highly prejudicial and irrelevant anti-Canadian evidence, would likely have required a reversal by the Mississippi Supreme Court under Mississippi state law.

But the Mississippi Supreme Court found a convenient way to avoid either reversing *O'Keefe v. Loewen* (which would have been politically dangerous given the power of the plaintiffs' bar in Mississippi) or of writing an opinion affirming *O'Keefe v. Loewen* (which would have humiliated the Mississippi Supreme Court and exposed it to review and reversal by the U.S. Supreme Court.) This expedient was simply to require the posting of what the Mississippi Supreme Court knew to be an impossible bond-- a ruling that had the effect of extorting a settlement from Loewen and making an appeal to the U.S. Supreme Court impossible.

5. The Denial of Justice is Completed

At the time application was made to the Mississippi Supreme Court for relief from the bond requirement imposed by the trial court, Rule 8(a) of the *Mississippi Rules of Appellate Procedure* provided that the party against whom a money judgment had been rendered could continue a ten-day automatic stay by posting an approved supersedeas bond within ten days. The bond was required to be for 125 percent of the judgment appealed from and needed to be in the form prescribed by the rule. However, the trial court and the Supreme Court, under Rule 8(b), could, for "good cause," set a supersedeas bond in an amount less than the 125 percent required under Rule 8(a), as I explained earlier.

Loewen was denied bond relief in the trial court and then proceeded to the Supreme Court under Rule 8(b) where it argued (with supporting affidavits from insurance consultants and financial specialists) that posting a $625 million bond would effectively bankrupt the company. Loewen filed a thorough supporting memorandum and the Plaintiffs did not attempt to show that Loewen would not be irreparably damaged simply by being required to post the 125 percent bond. Furthermore, Loewen offered to post a bond conforming to the requirements of Rule 8(a) in the amount of $125 million-- 125 percent of the (itself illegally inflated) compensatory award-- and to allow the Plaintiffs and the court certain prerogatives with regard to notice and control of Loewen's financial transactions to assure Plaintiffs that there would be no impairment of Loewen's ability to satisfy the entire judgment. (Motion for Stay, Exhibit K, at 10.)

Mississippi's Rule 8 of appellate procedure is modeled after similar provisions in the federal appellate rules and mirrors the law of most states. In the face of almost universal precedent to the contrary, only a court proceeding from an intent to deny appellate review would

have failed to allow security partially in a bond and partially in limitations of certain financial transactions when: (1) the lion's share of the judgment was for punitive damages that are imposed not for the benefit of the plaintiffs but rather for the benefit of society; (2) the appellant is capable of posting a bond to secure the compensatory part of the award; (3) the appellant is incapable of posting a bond to secure the punitive part of the award; (4) there are good faith grounds for appeal and a reversal or modification of the trial court's judgment is likely; and, (5) the appellant is willing and able to give assurances that collection of the entire award will not be impaired by issuing a supersedeas under less than full bond requirements. (*See, e.g., Olympia Equipment Leasing Company, et al. v. Western Union Telegraph Company,* 786 F.2d 794 (7th Cir., 1986); *Trans World Airlines, Inc. v. Hughes,* 314 F. Supp. 94 (S.D.N.Y., 1970)).

Thus, by failing to follow the overwhelming weight of authority, the Mississippi Supreme Court deliberately forced the Canadian Defendant, Loewen, into an extorted settlement and effectively foreclosed appellate review in the Supreme Court of the United States. Additionally, there is no doubt in my mind that these actions were willful and deliberate, and in no wise the product of inadvertence or poor judgment: these actions constituted not merely a denial of justice but a mockery of justice. Although no series of depositions would elicit a confession, when you see an owl at a mouse picnic, you know he didn't come for the sack races.

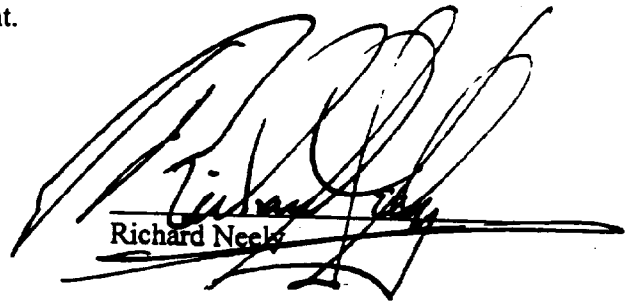
At the time Loewen sought to appeal, Mississippi allowed all defendants an appeal as a matter of right to the Mississippi Supreme Court. Deciding an appeal by Loewen, however, would have placed the justices of the Mississippi Supreme Court in an unenviable political position: a decision in conformity with the weight of Mississippi authority and U.S. Supreme Court precedent would almost inevitably have demanded a reversal of the trial court or, at the

least, a substantial remittitur. Therefore, in my opinion, and to reasonable degree of jurisprudential certainty, the refusal of the Mississippi Supreme Court to allow Loewen to appeal on the reasonable terms offered in Loewen's petition for waiver of bond under Rule 8(b) was a willful, deliberate and intentional act on the Court's part designed to avoid deciding the appeal on the merits. Furthermore, in my opinion, denying the bond reduction was intentionally calculated to force Loewen to pay the Mississippi plaintiffs and their lawyers immediately and without benefit of an appeal.

Any decision the Mississippi Supreme Court made on the merits in *O'Keefe* would have subjected the Court to retribution by Mississippi plaintiffs' lawyers and their allies for denying those constituents the fruits of their victory if the Court reversed. And, had the Court reviewed *O'Keefe* and affirmed, the Court would have been subjected to ridicule and contempt by the Mississippi bar, other judges and possibly the Supreme Court of the United States.

Therefore, for the above reasons, I believe to a reasonable degree of jurisprudential certainty that Loewen, because of its Canadian citizenship, was intentionally subjected to a complete denial of justice by the Mississippi trial court and the Mississippi Supreme Court.

AND FURTHER, the Affiant sayeth naught.



Richard Neely

Taken, sworn to and subscribed before me, this 23rd day of October, 1998 in the County and State aforesaid.

Deborah L. McHenry, Clerk
Supreme Court of Appeals of West Virginia

My Commission expires at the will and pleasure of the Supreme Court of Appeals of West Virginia.

Appendix A

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CURRICULUM VITAE

EDUCATION: A.B. Economics, Dartmouth College, 1964; LL.B. Yale Law School, 1967

MILITARY: Captain, U. S. Army Artillery, 1967-69. Served on the personal staff of John Paul Vann in Republic of Vietnam, 1968-69; author of the economic development portion of the 1969 pacification plan. Awarded Bronze Star.

BUSINESS AND PROFESSIONAL: Practiced law alone in Fairmont, W. Va., 1969-73; Chairman of the Board of Kane & Keyser Hardware Corp., Belington, W. Va., 1970-1988; General Partner in Forest Festival Terrace, a West Virginia real estate holding company; Private law practice, Neely & Hunter, Charleston, W.Va., April 17, 1995 to present.

GOVERNMENT: Elected to the West Virginia House of Delegates for the 1971-73 term from Marion County. Elected state-wide to the West Virginia Supreme Court of Appeals in 1972 for a twelve-year term. Reelected to a full term in 1984. Chief Justice of the West Virginia Supreme Court of Appeals, 1980-81, 1985-86, 1990-91, 1994-95 - retiring April 15, 1995 as Chief Justice. This is West Virginia's highest court with administrative responsibility for all lower courts.

MAJOR PUBLICATIONS: How Courts Govern America, Yale University Press, (New Haven and London, 1981)

Why Courts Don't Work, McGraw-Hill (New York, 1983)

The Divorce Decision, McGraw-Hill (New York, 1984)

Judicial Jeopardy: When Business Collides with the Courts, Addison-Wesley (Reading, MA, 1986)

The Product Liability Mess, The Free Press (New York, 1988)

Take Back Your Neighborhood: A Case for Modern-day "Vigilantism," Donald I. Fine, Inc., (New York, 1990)

Tragedies of Our Own Making, University of Illinois Press (Champaign, Illinois, 1994)

"The Politics of Crime," The Atlantic Monthly (cover story), August 1982, pp. 27-31

"Insider Trading Prosecutions Under the Misappropriation Theory: New York's Joke on Heartland America" (1994 WL 267860) (1994)

"The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed," 3 Yale Law and Policy Review, p. 168, (1985)

"Why Wage-Price Guidelines Failed: A General Theory of the Second Best Approach to Inflation Control." 79 W. Va. Law Review 1, (1976)

ACADEMIC:

Professor Economics, University of Charleston, Charleston, West Virginia, 1979-1990

Frederick William Atherton Lecturer, Harvard University, 1982-83

Visiting Professor of Law, Fudan University, Shanghai, People's Republic of China, 1984

EXHIBIT B

References Made or Elicited by Plaintiffs' Counsel to Race and Racial Matters[1]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
1	9/13/95	P139L9 - L20	Susan O'Keefe Knight testified that her father Jerry O'Keefe started in the funeral insurance business in 1958 and "has been in business for 40 years dealing with people all over the State of Mississippi, funeral homeowners, other insurance company owners, black and white."

[1] Exhibits B, C and D were limited to a total of no more than 100 pages and are not an exhaustive listing. There are two reasons for this. First, several hundred pages would be required to list every instance in which Plaintiffs' counsel referred to the three key themes illustrated in these exhibits. Second, these exhibits illustrate well enough the strategy of Plaintiffs' counsel, namely to inflame the jury by repeatedly emphasizing (1) race and racial matters, (2) the wealth of the defendants compared to both the jurors and the Plaintiffs, and suggestions for huge multi-million dollar verdicts, and (3) the foreign (Canadien) citizenship of Ray Loewen and The Loewen Group.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
2	9/14/95	P393 L12 - L16	Plaintiffs' counsel, in trying to downplay problem investments by the O'Keefe insurance companies in savings & loan institutions, asks the President of the Gulf National holding company [Mr. Walter Blessey] the following: " Q. . . . Now, it was - it's been fairly well reported, almost as much so as the O.J. trial [the highly publicized murder trial of African American former football star O J. Simpson, which involved overt racial issues] that the S&L industry had a problem, isn't that true, back at that time? A. Yes."
3	9/14/95	P403 L4 - L6	Plaintiffs' counsel, in a leading question, associates the Riemanns [and, by implication, Loewen] with white funerals in Gulfport: "Q And before that [i.e., before O'Keefe built a new funeral home in Gulfport in 1988], was there any business that was preponderantly oriented for white funerals in Gulfport other than the Riemanns?"
4	9/15/95	P461 L9 - L16	Mr. Walter Blessey testifies that "[o]ur Gulf National O'Keefe family companies do business with approximately 130 funeral homes, both black and white funeral homes throughout the State of Mississippi . . ."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
5	9/25/95	P1083 L9 - L25	Plaintiffs call Mike Espy, an African-American who had served as Secretary of Agriculture in the Clinton Administration. Mr. Espy begins by citing his Mississippi roots, his attendance at Yazoo City High School as "one of those to integrate the high school", and his attendance at Howard University [a college that was started for African-Americans and is largely attended by African-Americans].
6	9/25/95	P1086 L16 - L19	Plaintiffs' counsel [Mr. Gary, an African-American] and Mr. Espy both tell the jury that Mr. Espy was "the first African-American to serve as an assistant secretary of state . . . in Mississippi."
7	9/25/95	P1087 L12 - L19	Plaintiffs' counsel [Mr. Gary, an African-American] and Mr. Espy both tell the jury that Mr. Espy was elected to the U.S. Congress, but are quick to point out that he got the "African-American vote" but also got "both black and white vote together".
8	9/25/95	P1088 L1 - L5	Plaintiffs' counsel [Mr. Gary, an African-American] and Mr. Espy both tell the jury that Mr. Espy received campaign contributions from white folks too, "[n]ot just black people".
9	9/25/95	P1088 L16 - L19	Mr. Espy tells the jury that Mr. Espy was "the first African-American to become assistant attorney general [in Mississippi] . . . [and] the first African-American to become a Congressman in this state since reconstruction, since the Civil War . . . ."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
10	9/25/95	P1089 L23 - P1090 L21	Mr. Espy testifies that he grew up in the funeral business. He notes that his grandfather built up 35 African-American funeral homes that served the poor, and he also started the "first black hospital in the State of Mississippi." All his family worked in the funeral homes, and he and his brothers actually made caskets for the poor African-Americans the homes served.
11	9/25/95	P1091 L15- P1092 L14	Mr. Espy testifies that as he grew older, he progressed to helping with the funeral services, driving the bereaved families to and from the services, and observing his father work with burial insurance agents who sold burial insurance to be serviced by the family funeral homes.
12	9/25/95	P1094 L1- L25	Mr. Espy [an African-American] testifies that he knows Jerry O'Keefe, and is a friend and a stockholder in O'Keefe's companies. Mr. Espy testifies that "He's an honorable man. He's a decent guy. He keeps his word, and I certainly know that to be true, and he's a very respectable person. "
13	9/25/95	P1095 L23 - P1096 L22	After some serious coaching from Plaintiffs' counsel Mr. Gary [himself African-American], Mr. Espy testifies that yes, as an "African-American in Mississippi", he was inspired to respect Jerry O'Keefe. Mr. Espy testifies: " You know, maybe I was being too general. . . . as an African-American, personally, . . . I can say that he [Jerry O'Keefe] didn't exhibit any bias towards a person of different race. He dealt with me as a person, no matter what color I am. . . . I can certainly say he is a man without bias and without prejudice . . . "

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
14	9/25/95	P1096 L23 - L25	Mr. Espy says he is "proud" of O'Keefe for that attitude. The implication of the foregoing lines of questioning by Mr. Gary (Pages 1094 - 1096), is that Ray Loewen is different from Mr. O'Keefe when it comes to racial matters. Additionally, and at the very least, the foregoing lines of questioning are aimed at building tremendous jury sympathy for Mr. O'Keefe on the basis of race (given the number of African-Americans on the jury).
15	9/25/95	P1110 L19 - P1111 L18	Mr. Gary then calls another African-American in the funeral home business in Mississippi, Mr. Earl Banks, who lives "here in Jackson" and has been a resident all his life (41 years). He attended Jackson schools, then obtained a BA from "Jackson State University", and went to the "Mississippi College School of Law". He is a licensed attorney in "the State of Mississippi."
16	9/25/95	P1111 L22 - P1112 L5	Mr. Banks next testifies that he serves "in the Mississippi House of Representatives" and that his "primary business is at People's Funeral Home where I'm resident and it is a business that my family founded in 1925. We are celebrating 70 years of service here in the City of Jackson."
17	9/25/95	P1114 L19 - P1115 L2	The Banks' family funeral homes have served "the people", charged only "what they could afford" and "never turned away a family because of, you know, any type of financial hardship or condition that they may have had."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
18	9/25/95	P1116 L3 - L20	Mr. Banks testifies that he knows Mr. O'Keefe and he met him in 1980 when he joined what had been the all white funeral directors association in Mississippi. Mr. Banks explained that historically "there were two funeral directors association, one all black, at that time, and one all white . . ."
19	9/25/95	P1117 L1 - L6	Mr. Banks testifies that he and Mr. O'Keefe "had a working relationship there and then" when he met "then also over the years . . ." Mr. Banks also states that he was "also secretary, which is the director of the Mississippi Funeral Directors and Morticians Association which is a black association here in Mississippi, and I hate to keep saying black and white, but those were just the facts."
20	9/25/95	P1117 L9 - L14	Mr. Banks goes on to explain that in Mississippi "you have traditionally, you know, minority funeral hojmes, and basically you have traditionally white funeral homes just like you have churches and barber and beauty shops and so forth."
21	9/25/95	P1117 L9 - L21	At the urging of Plaintiffs' counsel, Mr. Banks states that Mr. O'Keefe "has been fair, he's been honest and straightforward. . . ." [Plaintiffs' counsel is clearly using Mr. Espy and Mr. Banks to win the African-American jurors over to Mr. O'Keefe's point of view, and to contrast O'Keefe's "honest" behavior toward African Americans with the alleged improper behavior of the foreign defendants.]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
22	9/25/95	P1118 L9 - L14	Mr. O'Keefe's Gulf National Insurance Company about "three or four years ago . . . came to us and said they were going to be selling preinsurance in the Afro-American market, and would be willing to go into partnership with them."
23	9/25/95	P1118 L15 - P1119 L 3	Asked by Plaintiff's counsel whether he thought "there was something unusual about that," Mr. Banks [realizing counsel's clear hint] testifies: "It was unusual because, basically, you know, here was a gentleman, of course, who had funeral homes all over the State of Mississippi, had his own insurance company. You know he did not have to come to us . .. or any other firm here in Jackson and say, you know, can't we work something out? What type of arrangement could we make that would be good for you and good for us, you know, win, win situation for the parties, and of course, Mr. O'Keefe did that."
24	9/25/95	P1132 L9 - L24	Over sustained objections, Plaintiffs' counsel tries to get Mr. Banks to say that the "Riemann [Loewen] owns all three" of the "Traditional white funeral homes" in Corinth, Mississippi. The Judge does not tell the jury to disregard the objectionable questions and answers, which results in the damage being done.
25	9/25/95	P1132 L9 - L24	Over sustained objections, Plaintiffs' counsel tries to get Mr. Banks to say that the "Riemann [Loewen] owns all three" of the "Traditional white funeral homes" in Corinth, Mississippi. The Judge does not tell the jury to disregard the objectionable questions and answers, which results in the damage being done.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
26	9/25/95	P1133 L12 - P1136 L6	Next, Plaintiffs' counsel wants Mr. Banks to help him establish a cost for burial vaults he buys from "Wilbert, the manufacturer" and compare that to the cost at "all three [white] locations [in Corinth, Mississippi]". Mr. Banks writes on an easel the difference between the $2,800 charged to the white customers at the white Corinth funeral homes and the "wholesale price of $940". [The difference is $1860, which Plaintiffs' counsel is asking the jury to believe is an excessive profit because there is no competition allegedly among the 3 white Corinth funeral homes. Plaintiffs' counsel has said they belong to Riemann, which is controlled by Loewen. Counsel are thus using Mr. Banks' credibility with African American jurors to bolster a pricing allegation that might otherwise seem rather speculative or weak.]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
27	9/25/95	P1138 L16 - P1139 L17	Focusing Mr. Banks' attention on the "two primarily African-American funeral homes and three nonminority or white funeral homes" in Corinth, Plaintiffs' counsel gets Mr. Banks to explain, again, the state of such affairs in Mississippi: "A. That is the typical situation in the State of Mississippi, and throughout the South and most of the United States of America. Q. Well, tell me about that. A. Well, traditionally, of course, prior to desegregation in the country, of course, whites traditionally went to the white firms and blacks traditionally went with the black firms. Of course, you have desegregation, of course, throughout the United States of America, blacks have chosen to go to black firms and whites have chosen to go to traditional white firms. You do have exceptions to that, however, in the various parts of the company, but there are no major exceptions to that in the State of Mississippi that I know of." Mr. Banks responds to counsel's prompting by concluding that white funeral homes do not compete with black homes.
28	9/25/95	P1142 L18 - L23	After several leading questions to which objections were sustained, Mr. Banks finishes direct examination for the Plaintiffs by stating that "in all of my years with caskets, vaults, any other type of funeral merchandise, all costs to funeral directors, black and white, or anything else have always been the same."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
29	9/25/95	P1195 L12 - P1196 L10	On re-direct, Plaintiffs' counsel gets Mr. Banks to testify that, even using defendants' cost and price charts, he Mr. Banks does not see any reason why "water costs" or "rent paid to funeral home space" or "transportation" to affect the cost of a vault. [Plaintiffs on 9/25/95 played the "race" card in a major way by calling both Mike Espy and Earl Banks and eliciting the foregoing testimony, which was both highly inflammatory and prejudicial to Ray Loewen and The Loewen Group.]
30	10/20/95	P4766 L2 - P4768 L4	Plaintiffs' counsel cross-examined Rev. Jones of the National Baptist Convention about a story in "Canada's National newspaper" that discussed a deal between The Loewen Group and the NBC. Counsel had Rev. Jones read the part of the story that said "'both the churches and Loewen hope to rake in a lot of cash, although Loewen is guarded in its revenue projections . . .'" Rev. Jones did not appreciate the inference that the deal had anything wrong with it.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
31	10/20/95	P4773 L3 - P4774 L16	Plaintiffs' counsel forces Rev. Jones to read an excerpt from the agreement with Loewen that calls for each of pastor selling a cemetery lot to maintain a $5,000 reserve and to be subject to charge backs for canceled orders. Rev. Jones repeats that some points are still being worked out, "this is, again, not a final agreement."
32	10/20/95	P4776 L1 - P4777 L10	Plaintiffs' counsel forces Rev. Jones to confirm that both parties signed the agreement, and has Rev. Jones again reiterate the $5,000 reserve requirement for pastors already noted above.
33	10/20/95	P4778 L3 - L14	Plaintiffs' counsel then illustrates that if "just only 1000 pastors . . . act as an agent, and each of their reserve account [sic] is $5,000, would you agree with me that the total account would be 5 million dollars?" Rev. Jones then agrees.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
34	10/20/95	P4780 L8 - P4782 L22, and P4785 L9 - L15	Plaintiffs' counsel then has Rev. Jones essentially concede that he needs to have legal help straightening out the various areas of concern he and counsel have discussed. Counsel also gets Rev. Jones to admit that the agreement does not mention funeral services, just cemetery lots, and does not give the church any right to control the prices that The Loewen Group will charge. The point of the foregoing line of questioning is obviously to try to suggest to the jury that the big corporation, The Loewen Group, is trying to take advantage of the Convention and its members and pastors, all to enrich Loewen by millions of dollars
35	10/27/95	P5577 L19 - Page 5578 L2	Coming back again and again to the National Baptist Convention contract with Loewen, Plaintiffs' counsel asserts sarcastically: "They [Loewen] were real slick with the Baptist Convention. They were real slick with them, because the Baptist Convention didn't have any lawyers at all. They was [sic] real slick with them."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
36	10/27/95	P5703 L21 - P5704 L1	Mr. Gary resorts next to a personal [and, in effect, a racial] attack on one of the defense lawyers, Mr. Blackmon: "See, everybody protects Ray Loewen. All his lieutenants, and I don't know how Mr. Blackmon, and I really didn't think he'd be able to stand here and tell you that National Baptist Convention contract was good for the National Baptist Association [sic]. I never thought he would have been able to say that."
37	10/27/95	P5704 L15 - L25	Mixing anti-Canadien and racial sentiments, Mr. Gary claims that Ray Loewen took advantage of the African-American church (National Baptist Convention) and intended to take from "African Americans" property "that their great grandfather's died and fought for and gave . . . to the church" so that such African American property would "end up in the hands of Loewen" so Ray Loewen can "make over 7.Something [sic] billion dollars offer [sic] of it, and it ain't right. It's not right. . . ."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
38	10/27/95	P5706 L23 - P5707 L4	Mixing anti-Canadien, religious and racial sentiments, Mr. Gary borrows language from the African American civil rights movement, and personalizes the arguments by asserting that: "I am reminded of that [religious and civil rights protest] song that we are soldiers in the Army, and we're fighting. Sometimes we have to fight, sometimes we have to cry, but we're fighting. That's all right. . . . Persecute us, call us nobody, talk about us. That's all right. . . . I'm going to keep on."

EXHIBIT C

References Made or Elicited by Plaintiffs' Counsel to Wealth Disparities (Including Ray Loewen's Substantial Wealth) and to Suggestions for a Large (Multi-Million Dollar) Verdict Size[1]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
1	9/13/95	P53 L16 - L20	". . . Jerry O'Keefe refused to stand by and allow The Loewen Group to do what they were doing to poor people, poor people, people who could least afford to be take advantage of, the Loewen Group."
2	9/13/95	P55L8 - L18 and P56L5-L13	Plaintiffs' counsel contends that using monopoly power to raise prices for a vault needed by a "poor family, no doubt" Loewen raises prices, thereby making its stockholders a lot of money. He summarizes the contention by saying "That's the Loewen Group, and it ain't right, and they've got to be stopped."

[1] Exhibits B, C and D were limited to a total of no more than 100 pages and are not an exhaustive listing. There are two reasons for this. First, several hundred pages would be required to list every instance in which Plaintiffs' counsel referred to the three key themes illustrated in these exhibits. Second, these exhibits illustrate well enough the strategy of Plaintiffs' counsel, namely, to inflame the jury by repeatedly emphasizing (1) race and racial matters, (2) the wealth of the defendants compared to both the jurors and the Plaintiffs, and suggestions for huge, multi-million dollar verdicts, and (3) the foreign (Canadien) citizenship of Ray Loewen and The Loewen Group.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
3	9/13/95	P64L8 - L14	Plaintiffs counsel argues that the reason for the trip to Canada was "because Ray Loewen said, 'You come up, visit me on my yacht.' A yacht that, through the company, the board allows him to spend a million dollars a year just to keep it, and his helicopter. . . ."
4	9/13/95	P79L8 - L15	Plaintiffs' counsel argues that the case is "about a man wouldn't [sic] keep his word, deceived people, would not deal with honor. This is by a man, Ray Loewen, that thought he could bully people, he could cluster all the businesses and run the prices up. I trust that your verdict will say, 'Ray Loewen, no more.' Thank you."
5	9/13/95	P175L25 - P176 L6	Susan O'Keefe Knight, Jerry O'Keefe's daughter, gave rambling testimony that "The Loewen Group violating our contract with Wright & Ferguson Funeral Home . . . triggered a chain of events and things happened to our company that have left us damaged. It's cost us millions of dollars to get into this courtroom today. . . . It's my understanding Mr. Loewen laughed in the face of one of our attorneys - " [At this point, defense counsel objected on the grounds of hearsay, and Judge Graves sustained the objection, but he never instructed the jury as to what it should disregard.]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
6	9/14/95	P242 L12 - L25	John Turner, former Loewen Group official, testifies that he thought the prices to be paid under the settlement agreement pricing formula "for the funeral home was going to be between 2 and 3 million dollars . . . . Where it was in that range, I could have cared less. The value of our insurance operation was going to be somewhere between 2 and 3, 4 million dollars, 5 million dollars. I didn't know, didn't care, as long as we used the provisions, the steps that were included in the contract . . ."
7	9/14/95	P259 L17 - L20	Mr. Turner testifies that Loewen, by allowing O'Keefe to have Family Care, would be giving up approximately "'20 million in future revenues'".
8	9/14/95	P260 L1 - L8	Mr. Turner indicates The Loewen Group was "spending somewhere between 90 and 150 million a year" in "Canadian, Canadian dollars, which at the time, if you're interested, was about 80 percent of a U.S. dollar, so convert to U.S. dollars, multiply 90 or 150 by .8, and that's about what we're spending [on acquisitions per year] when I was there."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
9	9/15/95	P455 L1 - L 8	Walter Blessey, the President of O'Keefe's insurance holding company Gulf Holdings, testifies that Loewen's Mr. Holmstrom was correct to write in a memo that an O'Keefe purchase of Family Guaranty Insurance would have given the O'Keefe insurance companies an immediate cash infusion of 2 ½ million dollars and would infuse 10 million dollars in premium income.
10	9/15/95	P460 L12 - L21	Defense counsel objected to a highly leading, suggestive and speculative question, and the Judge sustained the objection but failed to instruct the jury to disregard the question, which was as follows: "Q. Assume . . . that Loewen has since acquired businesses having a total of 20 locations in Mississippi. Would that ability to do business through those Loewen businesses be a substantial benefit to the O'Keefe company?"
11	9/15/95	P464 L13 - P465 L2	Defense counsel asks Mr. Blessey a leading question to establish that the O'Keefes could have gotten "'20 million dollars of future revenues'" if the O'Keefes acquired Family Care, and Mr. Blessey concurs and adds "20 million dollars is, I think maybe a conservative number" and it "could be greater than that."
12	9/15/95	P465 L3 - L6	Further, Mr. Blessey speculates also that future pre-need sales at Riemann "could be a substantial number as well."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
13	9/15/95	P518 L10 - L24	Mr. Blessey later testifies that he believes the lost business opportunities together "exceeded 20 million dollars".
14	9/15/95	P523 L15 - L25	Mr. Blessey, without clarifying or distinguishing the just-referenced testimony from transcript Page 518, testifies to the "lost benefit of having income that would have been earned on the existing assets that were in Family Guaranty . . . which I believe were approximately 6 and a half to 7 million dollars. The 10 and a half Millie dollars that would come from the funeral home cash trust, that would have been invested . . . ." [This testimony, together with the testimony from Page 518, seems calculated to impress the jury with large multi-million dollar numbers, without properly distinguishing *earnings* on invested principal dollars, and the principal itself. Together, these two items of testimony thus give a vague and imprecise impression of multi-million dollar losses and thus are rather misleading.]
15	9/15/95	P524 L14 -L18	Adding to this confusion, Mr. Blessey contends that the O'Keefe insurance companies' "net worth" would have been improved by "two and a half million dollars at a minimum". [This is another attempt, it would seem, to impress the jury with multi-million dollar numbers without any attempt to eliminate double-counting or to distinguish principal sums from earnings on principal.]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
16	9/15/95	P538 L14 - P539 L12	Mr. Blessey later testifies that insurance companies are worth more than their "statutory value," and have a "rule of thumb" value equal to "approximately one times the annual premium", and he contends thus that the companies would be worth "approximately 12 million dollars".
17	9/15/95	P539 L21 - P 540 L11	Mr. Blessey then claims that, had the potential transactions with Loewen proceeded, the O'Keefe companies' "book value" would have been higher by "approximately 10 and a half million" so that even if the Tops'l and Ensley real estate on the companies' books had zero value, the companies would have had a net increase in book value of "$6,250,000".
18	9/15/95	P541 L17 - L20	Mr. Blessey then claims that had all these transactions occurred, it would have "dramatically" helped.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
19	9/15/95	P544 L 21 - L24	Mr. Blessey testifies that the O'Keefe companies would have been better off by about "22.6 million dollars". [Again, no effort is made to distinguish this new multi-million dollar number from the others offered on Pages 518, 539, 541 of the transcript. All of these figures seem deliberately vague and imprecise. Accordingly, the testimony regarding these various large figures seems calculated to prompt double-counting by the jury at a minimum, or, worse, to condition and set up the jury for an unsupportable multi-million dollar figure to be suggested in the closing arguments of this trial, just as an unsupportable $650 million figure had been suggested to the jury by Plaintiffs' counsel during voir dire. See, Transcript of proceedings involving jury selection and challenges for cause, Page 511 at Lines 18 - 28, where Mr. Gary challenges a juror solely because he said "he couldn't bring back a verdict of 650 million dollars."]
20	9/18/95	P602 L 14 - L22	Mr. Blessey testifies that the O'Keefe companies had to hire Liberty Life Insurance Company to handle administrative services, and were "charged" "$1,466,301.18" more than would have been necessary because of the administrative supervision.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
21	9/18/95	P602 L 23 - P603 L2	Mr. Blessey testifies that the O'Keefe companies had to sell 9.9 percent of the companies "in order to raise the 2 million dollars" the Mississippi regulators were insisting upon.
22	9/18/95	P625 L2 - P626 L7	The following ploy was the subject of a sustained defense counsel objection (although the Judge did not instruct the jury to disregard the suggested figure). That is, Plaintiffs' counsel first had Walter Blessey add up the annual premiums reported in Mississippi by Family Guaranty for 1992, 1993, 1994 and 1995, which Mr. Blessey said came to "14 million" in "round numbers". Then, after getting that number in front of the jury, counsel tried to get Mr. Blessey to testify that $14 million was the annual premium "the Gulf companies would have gotten had they bought this company [Family Guaranty]?" As noted, an objection to this was sustained but without further instruction to the jury.
23	9/18/95	P635 L19 - L24	Mr. Blessey also contends that $775,000 was additional interest expense the O'Keefe insurance companies had to pay because they had to go get fair market mortgage rates. [The testimony was that the O'Keefes had obtained from their own insurance companies a very favorable mortgage rate when O'Keefe bought the Webb funeral homes. This non-arms' length "investment" by the O'Keefe insurance companies was a concern to the Mississippi regulators.]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
24	9/18/95	P638 L1 - L9	Mr. Blessey contends that his management led to a doubling in assets of Central Credit between 1990 and 1992 after it came out of Chapter 11 bankruptcy.
25	9/18/95	P639 L 4 - L12 and P641 L 1 - L25	Mr. Blessey claims that the O'Keefe insurance companies had to sell Central Credit, which, in his opinion, would have earned around $1 million or more a year. [Defense counsel objected to admission of an exhibit summarizing Central Credit's 1990-92 assets and income. Judge Graves overruled the objection.]
26	9/18/95	P649 L 10 - P650 L3	Plaintiffs' counsel tries to get Mr. Blessey to say that the 15,000 people insured by Family Guaranty would have died and used O'Keefe funeral homes at an average cost of $4,000 per funeral. Defense counsel rightly objected, and was sustained; however, the Judge did not instruct the jury to disregard the insinuation that O'Keefe might have earned 15,000 times $4,000 had O'Keefe bought Family Guaranty. Plaintiffs' counsel tried again to insinuate the same thing [Page 650 Lines 18-23], and again an objection was sustained but the Judge again gave no instruction to the jury to disregard the insinuation. [The damage was done.]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
27	9/19/95	P933 L11- P934 L7	[By way of background, Mr. Blessey on cross-examination had been shown a Florida complaint filed by the O'Keefe insurance companies against parties other than Loewen, alleging that the defendants named in the Florida lawsuit (i.e., not Loewen) were responsible for a loss of $2.7 million on a sale of Florida ("Tops'l") real estate which had been ordered by the Mississippi Insurance Department. See 9/19/95 Transcript, Page 917, Lines 21 through Page 918, Line 23]. Plaintiffs' counsel tried to rehabilitate Mr. Blessey by merely having him repeat the allegation that the O'Keefe insurance companies had "lost" $2.7 million, measured by an earlier "appraised value".
28	9/19/95	P975 L8 - L11	Without citing such "assumptions," Mr. Blessey claims that "based on certain assumptions" an actuary [Mr. Dyer] felt that the O'Keefe insurance companies would have benefitted from doing an insurance trust rollover as proposed in the alleged "settlement agreement," to the tune of "4 and a half million dollars."
29	9/25/95	P1084 L2 - L25.	Mike Espy, the African-American former Agriculture Secretary in the Clinton Administration in Washington, recites his prior experiences providing "legal services to poor people". Within these few transcript lines, there are 5 different references to the "poor" or the "indigent".

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
30	9/25/95	P1085 L1 - L5	Mike Espy repeats his testimony, stating again that back in that job, he would help you "if you qualified as a poor person".
31	9/25/95	P1089 L23 - P1090 L21	Mr. Espy testifies that he grew up in the funeral business. He notes that his grandfather built up 35 African-American funeral homes that served the poor, and he also started the "first black hospital in the State of Mississippi." All his family worked in the funeral homes, and he and his brothers actually made caskets for the poor African-Americans the homes served.
32	9/25/95	P1094 L1- L25	Having established his credentials as a friend of the "poor," Mr. Espy testifies that he knows Jerry O'Keefe, and is a friend and a stockholder in O'Keefe's companies. Mr. Espy testifies that "He's an honorable man. He's a decent guy. He keeps his word, and I certainly know that to be true, and he's a very respectable person."
33	10/19/95	P4572 L17 - P4573 L4	Mr. Gary sarcastically questions Loewen official Peter Hyndman about "the little boat that you talked about yesterday". He gets Mr. Hyndman to admit the boat will hold "up to 50 or so people" and is used for "socializing and for business discussions as well".
34	10/19/95	P4573 L7 - L9	Mr. Gary then gets Mr. Hyndman to admit the boat is "110 feet" in length.

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35	10/19/95	P4573 L10 - L21	Mr. Gary next questions Mr. Hyndman about the boat's ownership, and Mr. Hyndman testifies that the boat is owned by a company that is owned by Ray Loewen.
36	10/19/95	P4574 L 1 - L14	Mr. Gary asks Mr. Hyndman who pays for the boat, and he testifies the company pays the rent for the boat [to the company owned by Ray Loewen].
37	10/19/95	P4574 L15 - L17	Sarcastically, Mr. Gary concludes this line of questioning by asking Mr. Hyndman if "this little bitty boat . . . has a helicopter pad, too . . ?" Mr. Hyndman admits it does. [The point of this entire line of questioning is obviously to inflame the jury against Ray Loewen and his wealth (and his use of a 110-foot boat and a helicopter). Its relevance to the case is virtually nil, although the line of testimony is highly prejudicial to Mr. Loewen.]
38	10/19/95	P4586 L15 - L23	Similarly, Mr. Gary cross-examines Mr. Hyndman about a press release of The Loewen Group, announcing "'over 683 Million dollars'" of acquisitions in the first 9 months of 1995. [Again, counsel's point is to dramatize the relative wealth of The Loewen Group compared both to the Mississippi plaintiffs, and, of course, to the jurors themselves.]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
39	10/20/95	P4766 L2 - P4768 L4	Plaintiffs' counsel cross-examined Rev. Jones of the National Baptist Convention about a story in "Canada's National newspaper" that discussed a deal between The Loewen Group and the NBC. Counsel had Rev. Jones read the part of the story that said "'both the churches and Loewen hope to rake in a lot of cash, although Loewen is guarded in its revenue projections . . .'" Rev. Jones did not appreciate the inference that the deal had anything wrong with it.
40	10/20/95	P4769 L5 - L21, and P4770 L6 - L11	Plaintiffs' counsel then gets Rev. Jones to admit that Loewen is not paying the Baptist Convention any up-front fees or bearing any cost of establishing a marketing organization to contact the Convention's 8.2 million members, that the Convention must bear that start-up cost, and that in fact there is no final agreement as some of the terms are "not final" and are "terms that we're working, towards".
41	10/20/95	P4771 L18 - P4772 L2	Plaintiffs' counsel then gets Rev. Jones to admit that the agreement with Loewen covers only "cemetery products" and that "Loewen will own the graveyards . . . [and there's] nothing in that agreement for joint ownership between the National Baptist Association and its members and Loewen to own the cemetery, is there, sir?"

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
42	10/20/95	P4772 L20 - P4773 L24	Plaintiffs' counsel forces Rev. Jones to repeat the last admission.
43	10/20/95	P4773 L3 - P4774 L16	Plaintiffs' counsel forces Rev. Jones to read an excerpt from the agreement with Loewen that calls for each of pastor selling a cemetery lot to maintain a $5,000 reserve and to be subject to charge backs for canceled orders. Rev. Jones repeats that some points are still being worked out, "this is, again, not a final agreement."
44	10/20/95	P4776 L1 - P4777 L10	Plaintiffs' counsel forces Rev. Jones to confirm that both parties signed the agreement, and has Rev. Jones again reiterate the $5,000 reserve requirement for pastors already noted above.
45	10/20/95	P4778 L3 - L14	Plaintiffs' counsel then illustrates that if "just only 1000 pastors . . . act as an agent, and each of their reserve account [sic] is $5,000, would you agree with me that the total account would be 5 million dollars?" Rev. Jones then agrees.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
46	10/20/95	P4780 L8 - P4782 L22, and P4785 L9 - L15	Plaintiffs' counsel then has Rev. Jones essentially concede that he needs to have legal help straightening out the various areas of concern he and counsel have discussed. Counsel also gets Rev. Jones to admit that the agreement does not mention funeral services, just cemetery lots, and does not give the church any right to control the prices that The Loewen Group will charge. [One key point of the foregoing line of questioning is obviously to try to suggest to the jury that the big corporation, The Loewen Group, is trying to take advantage of the Convention and its members and pastors, all to enrich Loewen by millions of dollars.]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
47	10/24/95	P5106 L6 - P5108 L24	Sarcastically, Mr. Gary cross-examines Ray Loewen concerning whether he knows the difference between a boat and a yacht, and repeatedly presses Mr. Loewen which it is. Mr. Gary also says he can explain his answer. Then, Mr. Loewen says it can be called either and asks for a chance to explain, which Mr. Gary simply never gives him. Along the way, Mr. Gary does get Mr. Loewen to repeat that a helicopter can land on the vessel, and that Mr. Loewen has access to a helicopter. [Again, the purpose of such questions is to build animosity against the Loewen defendants based on disparities of wealth. The questions also harass Mr. Loewen.]
48	10/24/95	P5133 L15 - L24	Later Mr. Gary asks if the Riemanns were given a veto when "they came all they way to Canada". Mr. Loewen says no, and Mr. Gary also asks about whether the Riemanns got to ride on Mr. Loewen's boat (Mr. Loewen says they did not).

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
49	10/24/95	P5176 L11 - L25	Mr. Gary twice asks questions, to which objections are sustained, using the idea that Dave Riemann would not get a share of profits if "you all make 100 million dollars this ear and decided to declare dividends". Mr. Loewen observed that the Riemanns held Class B stock which did not get dividends. Counsel is obviously attempting to paint Mr. Loewen as a greedy person who was somehow keeping profits from Mr. Riemann. were given a veto when "they came all they way to Canada". Mr. Loewen says no, and Mr. Gary also asks about whether the Riemanns got to ride on Mr. Loewen's boat (Mr. Loewen says they did not).
50	10/24/95	P5187 L3 - L14	Finally, Mr. Gary asks about a press release that indicates Loewen in the first 9 months of 1995 had done "683 million dollars" of acquisitions.
51	10/27/95	P5540 L24 - L25	In his closing, Mr. Gary begins by asserting that O'Keefe has spent "millions of dollars" and lost sleep to get there in court.
52	10/27/95	P5541 L21 - P5542 L6	Mr. Gary next turns his attention to the National Baptist Convention deal with Loewen and argues Loewen is going to make "huge" money "off 8.2 million African-Americans": "many millions. . . It's about greed. It's about dollars."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
53	10/27/95	P5542 L7 - P5543 L5	Mr. Gary continues to emphasize the National Baptist Convention deal with Loewen and asserts that Loewen will have reserves "mount up to 300 million dollars, the interest on that a year alone adds up to 19.5 million dollars."
54	10/2/95	P5543 L22 - L24	Mr. Gary erroneously argues that experts have been "paid 40 to 50 million dollars." That was not true, and Judge Graves sustained an objection, though he did not tell the jury to disregard that figure. So, at Page 5544, Line 4, Mr. Gary changes it to "40 or $50,000". The suggestion has been made, however.
55	10/27/95	P5544 L20 - L25	Mr. Gary reminds the jury that, in voir dire, he specifically had asked all of the "'If this case exceeded 850 million dollars', and it will,' would you have any problems with it,' and you said no. As a matter of fact, I asked that if anyone here, if you felt comfortable sitting on a case that could exceed 850 million dollars, raise your hand . . . ." He reminds them they did not hesitate to proceed.
56	10/27/95	P5548 L16 - L19	Mr. Gary argues that John Wright told them that after Loewen bought Wright & Ferguson, Loewen "first thing" raised prices far above what Mike Espy's family charged in their funeral homes.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
57	10/27/95	P5553 L20 - P5554 L14	Mr. Gary returns to the National Baptist Convention deal, perhaps sensing that this is a sore subject with the jury. He argues that Rev. Jones was "surrounded by sharks" on the contract, didn't even have a lawyer in dealing with Loewen. [The implication is Ray Loewen took advantage of him.] Mr. Gary throws out a "757 million dollars" figure as the amount of interest Loewen could earn on "300 million dollars" of reserves on the deal, over 20 years, with at least "19.5 million" in interest per year.
58	10/27/95	P5557 L13 - L16	Mr. Gary reminds the jury of his cross-examination of Ray Loewen, and claims that Mr. Loewen "just lied" about whether he had a yacht or a boat. "Nothing wrong with the man having a yacht, but if you've got a yacht, just say it."
59	10/27/95	P5558 L7 - L16	Mr. Gary reminds the jury, again, of Mr. Wright's testimony that Loewen raised prices.
60	10/27/95	P5560 L1 - L12	Mr. Gary argues that Loewen raised prices after squeezing out competition, and asserts that was why Loewen did not want to do business with O'Keefe.
61	10/27/95	P5568 L21	Mr. Gary, having tossed out "millions" of suggested damage items in his closing, suggests a bigger figure of "105,832,000" which apparently was blown up on an overhead or enlargement for the jury to see.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
62	10/27/95	P5591 L18 - L19	Mr. Gary suggests the "105 million" may not be enough in their opinion. He repeats the "105,832,000" suggestion, adding that they can raise it..
63	10/27/95	P5591 L18 - L19	Mr. Gary suggests the "105 million" may not be enough in their opinion. He repeats the "105,832,000" suggestion, adding that they can raise it..
64	10/27/95	P5713 L1 - P5715 L4	Mr. Gary suggests a "104,852,000" figure *four separate times* and the figure of "105,332,000" once, and the figure of "105,832,00 *three separate times*, all in this short span of perhaps 1 minute of talking. He also suggests "105 million" once during this same span, in which he wrapped up his closing.
65	10/27/95	P5704 L15 - L25	It also is worth noting that Mr. Gary also used heavy anti-Canadien and populist racial sentiments, to claim in his closing argument that Ray Loewen took advantage of the African-American church (National Baptist Convention) and intended to take from "African Americans" property "that their great grandfather's died and fought for and gave . . . to the church" so that such African American property would "end up in the hands of Loewen" so Ray Loewen can "make over 7.Something [sic] billion dollars offer [sic] of it, and it ain't right. It's not right. . . ."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
66	10/27/95	P5706 L23 - P5707 L4	Adding religious themes to his anti-Canadien and populist African American rhetoric, Mr. Gary also personalizes these inflammatory arguments by asserting that: "I am reminded of that [religious] song that we are soldiers in the Army, and we're fighting. Sometimes we have to fight, sometimes we have to cry, but we're fighting. That's all right. . . . Persecute us, call us nobody, talk about us. That's all right. . . . I'm going to keep on."

EXHIBIT D

References Made or Elicited by Plaintiffs' Counsel to the Foreign Status of Defendants and the Local (Mississippi) Status of Plaintiffs[1]

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
1	9/13/95	P3 L9 - P4 L9	Portrait of extended O'Keefe family [to underscore longstanding local Mississippi roots], was to be used by Plaintiffs' counsel in opening statement.
2	9/13/95	P5 L4 - P6 L7	Chart depicting O'Keefe family and business tradition/history [to underscore longstanding local Mississippi roots], was to be used in opening statement by Plaintiffs' counsel.
3	9/13/95	P9 L4 - L7	"O'Keefe family business began in 1865 at . . . Ocean Springs, Mississippi"
4	9/13/95	P11 L20 - L25	Loewen did business wrongfully, contrary to the "fair and competitive way upon which this nation is founded . . . so they can have a monopoly . . . ."

[1] Exhibits B, C and D were limited to a total of no more than 100 pages and are not an exhaustive listing. There are two reasons for this. First, several hundred pages would be required to list every instance in which Plaintiffs' counsel referred to the three key themes illustrated in these exhibits. Second, these exhibits illustrate well enough the strategy of Plaintiffs' counsel, namely, to inflame the jury by repeatedly emphasizing (1) race and racial matters, (2) the wealth of the defendants compared to both the jurors and the Plaintiffs, and suggestions for huge, multi-million dollar verdicts, and (3) the foreign (Canadien) citizenship of Ray Loewen and The Loewen Group.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
5	9/13/95	P12 L5	"This is not about Canada."
6	9/13/95	P12 L6	"I have traveled to that wonderful Country [Canada]."
7	9/13/95	P12 L6 - L8	Canadian people are "almost as fine as we have here in Mississippi".
8	9/13/95	P12 L9 - L11	"Truth is true in Canada as it is in Mississippi."
9	9/13/95	P12 L11 - L12	"You can't enlarge upon "truth" by moving from one place to another, so we're not against Canada."
10	9/13/95	P12 L14 - L16	"We're just against a man who happens to live in Canada whose name is Ray Loewen . . . ."
11	9/13/95	P12 L16 - L21	Wherever Ray Loewen goes "he uses . . . predatory or exclusionary trade practices in order to destroy competition." Everywhere in "Mississippi" he went, that was true.
12	9/13/95	P12 L22 - L23	"They [Loewen] raised prices as soon as they got strong enough to deny the people a choice."
13	9/13/95	P12 L23 - L25	They hurt "the people" and have "twenty locations across the State [of Mississippi] and growing everyday."
14	9/13/95	P13 L5 - L17	"Every contract in this nation, according to the law of our people developed by our four fathers and given to us that we might live in peace and prosperity says every contract has . . . a covenant . . . that the parties will deal in good faith and with fair dealing . . . they exercised bad faith, . . . they did not engage in fair dealings."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
15	9/13/95	P14 L5 - L14	"If Judge Graves . . . as a representative of the people of Mississippi who are ordained and established this very Court for this very purpose . . . tells you that these things are illegal as I anticipate that he will . . . bring in a verdict for the plaintiffs."
16	9/13/95	P15 L1 - L6	". . . the Wright & Ferguson family does business, in basically the Jackson area . . .
17	9/13/95	P15 L23 - P16 L4	Loewen in 1989 acquired the Riemann family company on the Mississippi Coast; the Riemann's "are an honored name in the funeral business in Mississippi. Loewen controls the Riemann company absolutely and utterly."
18	9/13/95	P16 L10 - L12	The Loewen Company bought "Baldwin-Lee Funeral Home here in Jackson, and they bought Stephens."
19	9/13/95	P17 L5 - L7	"They [Loewen Company] owns Stephens in Meridian, which is the third of the three big areas of Mississippi . . . ."
20	9/13/95	P17 L13 - L15	Loewen's wrongful actions are intended by "the Loewen company everywhere it is."
21	9/13/95	P17 L15 - L16	"They [Loewen Company] have 5 or 600 funeral homes in America."
22	9/13/95	P17 L16 - L17	"They [Loewen Company] gained another fifty or so [in USA] this year alone, maybe 100 by now. The documents I have read are not recent."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
23	9/13/95	P17 L18 - L21	"They [Loewen Company] control the market . . . deny the people a choice so that they can raise prices, and people have to pay whatever they [Loewen Company] please."
24	9/13/95	P17 L21 - L22	"They [Loewen Company] do this in Canada, and they do this in America."
25	9/13/95	P18 L9 - L14	They [Loewen Company] break their contracts and word, their "word is no good." They try to control the market and "hide behind the honored family names of people in the local community of this State and this nation."
26	9/13/95	P18 L25 - P19 L3	In Mississippi, Loewen tried to buy and control "the largest and most valuable and most profitable" markets . . . Jackson, the Mississippi Coast and Meridian."
27	9/13/95	P19 L9 - L14	Loewen "started this whole fight by entering competition with Riemann family when they bought a business in Gulfport. . . . [Loewen's] motive was that Loewen . . . intended to buy out and destroy O'Keefe's business."
28	9/13/95	P19 L18 - L23	Loewen broke contracts with Wright & Ferguson that "had been honored for 20 years . . . despite the fact that Gulf National had agents going through this city [i.e., Jackson, Mississippi] and selling funerals for Wright & Ferguson . . . ."
29	9/13/95	P20 L14 - L17	Then, ". . . within six months they [Loewen] bought Wright & Ferguson and broke Gulf National's contract [with Wright & Ferguson], they broke a similar contract that was almost as old between Baldwin-Lee and Protective Service Life."

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30	9/13/95	P20 L18 - L20	O'Keefe "went to them respectfully, honorably, and he asked that the contract be honored. He asked that Loewen do the right thing. They refused."
31	9/13/95	P20 L21 - L23	"Mr. O'Keefe was invited to come to Vancouver, and you are going to see evidence of that trip to Vancouver."
32	9/13/95	P20 L23 - P21L2	". . . [I]n Vancouver, Mr. O'Keefe respectfully asked that this [Gulf National - Wright & Ferguson] contract be performed. . . . [Loewen] demanded that he sell Bradford O'Keefe's businesses to them, along with Meridian, so that they would have a further strangle hold."
33	9/13/95	P21 L2 - L5	"They [Loewen] would be able to deny the people [of Gulfport, Meridian and Jackson, Mississippi]. . . any choice about what to pay and with whom to do business."
34	9/13/95	P21 L6 - L9	Loewen denied Gulf National "the entire ability to sell in Jackson, which is the largest market of the state . . ."
35	9/13/95	P21 L9 - L16	Loewen did these things to force Mr. O'Keefe "to sell his family business that he inherited from his father and his family before that. . . . [prompting] O'Keefe to file suit . . ."
36	9/13/95	P21 L25 - P22 L2	Loewen's number two man, Mr. John Turner, " . . . admits they had no excuse to break it [Gulf National's contract with Wright & Ferguson]."
37	9/13/95	P22 L6 - L12	Loewen's "Mr. Turner came to Jackson, Mississippi . . . and made a settlement agreement."

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38	9/13/95	P22 L12 - L14	Loewen "hired two of the biggest law firms in Jackson . . . and [a] Canada law firm . . . to work out this [settlement] contract."
39	9/13/95	P22 L16 - L25	Loewen "wanted to keep the monopoly that they gained by buying both Baldwin-Lee and Wright and Ferguson, and they imposed that on Mr. O'Keefe."
40	9/13/95	P23 L7 - L13	O'Keefe had to give Loewen a monopoly in Meridien and in Jackson, Mississippi. Thus, "[t]he people would have no choice. The prices would go up."
41	9/13/95	P23 L14 - L16	O'Keefe had to "give up the right to do business in Jackson, Mississippi and give Loewen a monopoly here."
42	9/13/95	P23 L17 - L21	O'Keefe also had to give Loewen a "right of first refusal" on Bradford O'Keefe, so that if O'Keefe ever wanted to sell, Loewen "had the right to control who bought it, and it would be themselves."
43	9/13/95	P24 L3 - L6	"If the settlement was not carried out, he [O'Keefe] would have to fight for his life . . . against a rich and powerful international corporation."
44	9/13/95	P24 L14 - L19	"Ray Loewen had a choice. . . . He could avoid coming before a jury just like you, ladies and gentlemen. He could take away the cemetery property, and then he could deny that it was a contract, and that's just what he did."

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45	9/13/95	P24 L20 - P25 L10	Loewen accountant Don Holmstrom wrote a memorandum to Loewen's "big four" on July 24, 1991 after he "came to Mississippi to investigate the [O'Keefe] companies on behalf of Loewen . . . and it said that he [Holmstrom] was opposed to this."
46	9/13/95	P26 L1 - P27 L2	Plaintiff's counsel again emphasizes Holmstrom's trip down to Mississippi and his "conversations with various people in Mississippi", and argues to the jury that Holmstrom's July 24, 1991 memo indicates that Loewen "knew of his [O'Keefe's] financial vulnerability and intended to take advantage of it."
47	9/13/95	P28 L16 - P29 L8	Plaintiff's counsel argues Ray Loewen had the settlement agreement "done behind the backs of the [local] Riemann family" and did not tell or ask them about it ahead of time.
48	9/13/95	P29 L9 - L24	"Ray Loewen and the Loewen organization sold everybody [various Mississippi families] out."
49	9/13/95	P29 L25 - P30 L1	"Ladies and gentlemen, our fight is with Ray Loewen. Our fight is not with John Wright [from Mississippi]."
50	9/13/95	P30 L3 - L4	Plaintiffs' fight also "is not with David Riemann [another local Mississippi person]."
51	9/13/95	P30 L4 - L8	"[A]ccording to Ray Loewen, [David Riemann] has some phantom stock . . . in Riemann Holdings, but he . . . really doesn't own any stock in it according to Ray Loewen."

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52	9/13/95	P30 L15 - L17	When the "Riemann family found out . . . they were angry. . . . [and so] they went to Vancouver, Canada."
53	9/13/95	P31 L4 - L5	Plaintiff's counsel claims that a document by Bob Lundgren of Loewen indicates a commitment to the Riemenns was "'made in Vancouver'"
54	9/13/95	P31 L21 - L24	Plaintiff's counsel claims that a 9/16/91 memo from John Turner of Loewen comments on Riemenns' state of mind when they had "left Vancouver".
55	9/13/95	P32 L24 - L4	Ray Loewen "destroyed O'Keefe's ability to become a competitor in Jackson and give our people a choice" and then broke all his promises.
56	9/13/95	P33 L19 - L21	Loewen insisted on a copy of all Gulf National's "policyholders in Mississippi".
57	9/13/95	P34 L1 - L4, and P34 L7 - L10	The 1991 litigation also had been in front of Judge Graves who, plaintiffs' counsel claimed, was "representing, then, as now, the people and the law of Mississippi . . . [and] asked us [plaintiffs] to go to Cincinnati to try to settle . . .."
58	9/13/95	P35 L19 - L22	Loewen's legal position, that there was no binding legal contract given problems they uncovered in due diligence, "is a pretext, and in Jefferson County, language is a lie."
59	9/13/95	P36 L3 - L9, and P36 L20 - P37 L1	Mississippi witnesses and "[e]verybody else in the sound of my voice" know plaintiffs' legal position on the alleged contracts is correct.

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60	9/13/95	P37 L9 - P38L7	Plaintiffs' insurance businesses were not in bad shape as Loewen will allege; rather, they "were in good shape, but they were borrowed up, just like many of us. . . . [and] Ray Loewen knew that."
61	9/13/95	P38 L14 - L21	Ray Loewen's alleged "mode of operation" is that he "seeks to destroy competition, gain monopoly power in all possible areas and give the people no choice. He wants to raise prices upon the backs of poor people who need to bury their beloved old. That's his purpose. He does that in Mississippi, Louisiana, Tennessee, Pennsylvania, Canada."
62	9/13/95	P39 L2 - L9	O'Keefe "was a [U.S.] marine . . . and he fought back to the bloody nub and will to the end of this case . . . ." He stands as an obstacle to Ray Loewen's "way".
63	9/13/95	P39 L17 - P40 L19	Plaintiff's counsel says "I know", along with other persons in Mississippi, that the plaintiffs' insurance companies would not have been placed into "bankruptcy or administrative supervision" if Loewen had not caused that to happen, stripping O'Keefe "of everything but his family heritage in Biloxi and Ocean Springs, and he's here today fighting to keep that."
64	9/13/95	P42 L3 - L8	Plaintiffs' counsel says plaintiffs' claims are based on "the people of Mississippi through the legislature, giving the power to the people of Mississippi through the jury box to say no to people like Loewen who would build rich fortunes upon the misery and the poverty of burying loved ones of the people of the poorest state in our nation."

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65	9/13/95	P42 L24 - L8	Plaintiffs' counsel argues for punitive damages by claiming that Loewen's conduct was "harmful to society" and then asserting that "Loewen has stock holdings which he personally owns 26 percent that are worth almost 2 billion dollars." [Defense counsel objected to the latter assertion, pointing out that the trial judge had supposedly bifurcated the trial into a regular liability phase and, if necessary, a punitive damages phase. The judge sustained the objection. Nonetheless, the jury had already heard the above assertion in opening statements.]
66	9/13/95	P43 L19 - P44 L5	Plaintiffs' counsel argues that he and other counsel stand "shoulder to shoulder . . . to speak out for Jerry and Annette O'Keefe and their 13 children . . . . [and that] the O'Keefe family has been subjected to . . . a war. . . ."
67	9/13/95	P49 L15 - L19	O'Keefe family tradition started "130 years ago in . . . Ocean Springs, Mississippi" and "just didn't start in Mississippi in 1990 like Ray Loewen did."
68	9/13/95	P50 L6 - L19	" . . . at the tender age of 19 for Jerry, . . . our country was at war in the South Pacific, and Jerry volunteered . . . ." He came back so that "Biloxi just didn't receive an American hero . . . but they received a fighter in Jerry O'Keefe. . . ."
69	9/13/95	P51 L7 - P52L3	O'Keefe came "back home from the war . . . [and] married his childhood sweetheart [in Mississippi]." They raised a big family and "believed in family and family values". O'Keefe worked "religiously with his father building the [funeral home] business, not trying to do it overnight."

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70	9/13/95	P52 L15 - L20	From 1960-64, the "People of Biloxi trusted him and saw fit to send him to the Capitol to represent them."
71	9/13/95	P52 L21 - P53	The people of Biloxi again "called on one of their own, Jerry O'Keefe, to lead their city . . . as mayor" and he served in the '60s and '70s.
72	9/13/95	P54 L6-L14	" . . . Ray Loewen didn't understand . . . that when he decided to come to Mississippi and put this man and this family [Plaintiffs' counsel Willie Gary at this point made all the O'Keefe family in the courtroom stand up] . . . out of business, what he didn't understand, [was] that he was dealing with not only a man that went and fought for his country, but he was dealing with a fighter."
73	9/13/95	P56 L18 - L25	Plaintiffs "got no beef with" Mr. John Wright [from Mississippi]; rather, they contend that have brought Mr. Wright into court because his name is on a contract that Loewen obtained and then broke: "They flat out broke it. They've got no respect for how they hurt people when they break them."
74	9/13/95	P57 L7 - L22	Wright [from Mississippi] honored his contract with O'Keefe, so that when he signs his name "it stands for something"; plaintiffs contrast this with their contention about Ray Loewen "no sooner than you turn your back, he'll stick it to you. That's Ray Loewen."
75	9/13/95	P58 L2 - L7	Wright will testify everything with the contract was "doing real fine . . . before, lo and behold, Ray Loewen descended on the State of Mississippi . . . ."

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76	9/13/95	P58 L19 - L25	" . . . you see, you've got understand Ray Loewen. It ain't about where he's from. . . ." Plaintiffs' counsel contends Ray Loewen would "target one top dog in the area" and then use him to "gobble up all the other people". The Riemenns [also from Mississippi] were next after Mr. Wright.
77	9/13/95	P59 L2 - L12	Ray Loewen bought the Riemenns' insurance company and used it to take "business that they knew that Mr. Wright had been contracted with Jerry O'Keefe for over the last 125 years." [Note: the "125 years" is in the transcript, it is not a misprint here.]
78	9/13/95	P61 L2 - L14	Plaintiffs' counsel asserts that Mr. Wright, "the honorable man [from Mississippi] is in court, but that Ray Loewen is not in court. Counsel then asks rhetorically, "Where's Ray Loewen?" Counsel argues that O'Keefe wrote Ray Loewen in December 1990, before filing any lawsuit, trying to work things out, but that Ray Loewen "throws the rock that hides the hand."

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79	9/13/95	P61 L16 - L23	Plaintiffs' counsel points to a depiction of the state seal, apparently on an overhead projection of a letter written to the Loewen Group. He makes the following argument: "y'all see the seal up there. That's the State of Mississippi. That's the State of Mississippi, the State of Mississippi said to . . . The Loewen Group up in Canada . . . 'We're writing you on behalf of the Mississippi Attorney General's Office, Consumer Protection" - that's their people, that's not just Jerry, the people, members of the jury. 'Our office is responsible for protecting - protecting Mississippi consumers." " . . . y'all see the seal up there. That's the State of Mississippi, the State of Mississippi said
80	9/13/95	P62 L1 - L14	That letter is then construed by plaintiffs' counsel as referring to a newspaper article on "the issue of funeral home ownership, local versus foreign. . . . You can come out of another country and own it, but . . . 'such foreign or national entities cannot represent to the consumers of a given area that they are locally owned.'" Plaintiffs' counsel argues that what Loewen did was like saying "I'm in Wal-Mart buying K-Mart goods." [Defense counsel objected to the argumentation, and the Judge merely said "Sustained" - the damage was nonetheless done.]

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81	9/13/95	P63 L1 - L5	Jerry O'Keefe "tried to resolve" his differences with the Loewen Group. "They had him come up at Canada after he [O'Keefe] told them that if they didn't respond he was going to have to sue them, the American way, and they said, 'You come up to Canada, and we'll sit down and talk it over,' and then, you know what, no sooner than they got to Canada . . . . [t]hey wanted to buy a couple of his funeral homes. They wanted to give him Family Guaranty in exchange. . . . you know what, the MO of Ray Loewen, he never intended . . . to honor the deal. Now, that's deceit."
82	9/13/95	P64 L8 - L14	Plaintiffs counsel argues that the reason for the trip to Canada was "because Ray Loewen said, 'You come up, visit me on my yacht.' A yacht that, through the company, the board allows him to spend a million dollars a year just to keep it, and his helicopter. . . ."
83	9/13/95	P64 L14 - L19	Ray Loewen told O'Keefe in Canada that "I want you out of Mississippi. I want you out of Mississippi. That's what he told him." [Repetition in transcript.] O'Keefe [from Mississippi] told them no.
84	9/13/95	P64 L23 - P65 L10	O'Keefe would not trade or sell his family's funeral homes, one of which his family "lost . . . during the depression . . . [and] 48 years later, he [O'Keefe] brought it back into the fold, proud tradition . . .." [Defense counsel again objected that Plaintiffs' counsel was arguing again, but Judge Graves let counsel proceed with this line, merely saying "Overruled."]

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85	9/13/95	P65 L10 - P65 L17	O'Keefe then "couldn't take anymore. He filed a lawsuit. Now . . he had to include the Wright & Ferguson [from Mississippi] on there because the contract was with them. Y'all understand that? The contract was with them. But really, Mr. Wright - he had no beef with Mr. Wright [from Mississippi]. . . . Now, he filed a lawsuit here in this court, in this town . . . ."
86	9/13/95	P65 L18 - L24	" . . . the evidence will show . . . that Ray Loewen said, 'Wait a minute. John Turner, you go down there and stop this lawsuit. I'm going to give you power to go make a deal. You go stop this lawsuit.' Now, remember, John Turner is third in charge . . . . He's third in charge, members of the jury, came down to Mississippi."
87	9/13/95	P65 L24 - P66 L21	"Jerry was down there [Mississippi] tending his own business, going along with his lawsuit, the American way." Ray Loewen sent John Turner, who, Plaintiffs' counsel argues, felt it wasn't right, and obtained more concessions. ". . . [T]hey come up with another reason to make another concession, over and over and over again, concession." So, "they worked up a settlement, a settlement of the lawsuit."

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88	9/13/95	P69 L20 - P70 L21	Plaintiffs' counsel argues that under the settlement, Ray Loewen got a release of O'Keefe's lawsuit and in return got an option on cemetery property in Jackson and the right to keep the O'Keefe's out of the funeral home business in Jackson: "Ray Loewen, knowing that he didn't want him in Jackson, because more competition, he has to charge the people less. You see what - he can go crazy on people where there's no competition."
89	9/13/95	P71 L23 - P72 L24	Plaintiffs' counsel argues that a memo indicates that a Loewen representative had "'conversations with various people down in Mississippi the past 18 months' [and that the representative had] . . .been "talking to people [in Mississippi] over 18 months talking about Jerry . . .." Counsel then implies that Loewen in December had decided not to carry out all of the alleged settlement agreement because they allegedly had learned that doing so would significantly improve Jerry O'Keefe's financial position.
90	9/13/95	P77 L2 - P78 L3	Plaintiffs' counsel contends that Ray Loewen "never intended to live up to" the settlement agreement with O'Keefe, but "he just hadn't told the Riemenns. . . And Dave Riemann found out about it and went storming up to Canada, bust in his door and said, 'look, your [sic] lying. . . . You're not going to sell Family Guaranty to Mr. O'Keefe.'" But, counsel argues, "Ray said don't worry about that. . . because he knew that he was sending John [Turner to Mississippi] to make a deal that . . . he was never going to live up to. Just like Mr. Clemons from Pennsylvania is going to tell you . . .."

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91	9/13/95	P78 L14 - L18	"Members of the jury, when it's all said and done, hear all the evidence in this case, there's no doubt in my mind you, too, will know that you can say with your verdict to Ray Loewen, "no more, not in the State of Mississippi and hopefully nowhere else, but no more. It's not right."
92	9/13/95	P132 L1 - L4	Witness Susan O'Keefe Knight [daughter of Jerry O'Keefe] lives in "Ocean Springs, Mississippi, which is right over the bridge from Biloxi."
93	9/13/95	P132 L13 - L25	Susan O. Knight has worked in the family business since she "was in Junior High . . . through college" and, after teaching for 3 years right after college, she decided that teaching was not what she wanted to do. Thus, she testified that she returned to the family business "in approximately 1979, and [had] been there since."
94	9/13/95	P136 L17 - L19	Susan O. Knight's father Jerry O'Keefe served in the "Mississippi State legislature".
95	9/13/95	P137 L21 - P138 L4	Her father Jerry O'Keefe also served two four-year terms as mayor of Biloxi, Mississippi.
96	9/13/95	P139 L9 - L20	Her father Jerry O'Keefe started in the funeral insurance business in 1958 and "has been in business for 40 years dealing with people all over the State of Mississippi, funeral homeowners, other insurance company owners, black and white."

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97	9/13/95	P147 L1 - L7	A "bank in Mississippi" was trustee of the relevant insurance trust.
98	9/13/95	P147 L16 - P149 L3 [Quoted reference to Mississippi is on P149]	"Throughout the State of Mississippi" and "beyond", funeral homes in the late '80s began doing "what is called a trust roll over" .
99	9/13/95	P154 L12 - P155 L1	[Defense counsel objected to the following, on hearsay grounds, and the objection was sustained. Nonetheless, the following reference to Canada was already made to the jury.] " . . . I believe he [Susan O. Knight's father, Jerry O'Keefe] traveled to Canada or . . . maybe they came here. . . ."
100	9/13/95	P155 L2 - L6	After the just-mentioned sustained hearsay objection, Plaintiffs' counsel continued: "Let me ask you this. So we make this clear, did your daddy go to Canada to meet Mr. Turner to make an agreement to settle this matter, or did Mr. Turner come down to Mississippi?" Ms. Knight answered "I can't remember. I'm just not sure."
101	9/13/95	P155 L9 - L12	Plaintiffs' counsel continued: Q. Do you recall your father having some dealings with Mr. Turner? A. Yes, I believe my dad went to Canada the first time. Q Okay. A. Because I remember him saying . . . [Defense counsel again objected, and again was sustained! However, Judge Graves never instructed or warned the jury to disregard the inappropriate questions and answers.]

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102	9/13/95	P180 L12 - P181 L13	Susan O. Knight also testified that the alleged settlement agreement "called for us to surrender our option [to do a funeral home and cemetery in Jackson, Mississippi] to the Loewen Company." Plaintiffs' counsel followed up: Q After, did your daddy give up the right to come to Jackson and establish a business? A. Well, yeah, I mean it was a lost opportunity, I mean, we had the option. They took it from us . . . The Loewen Company."
103	9/14/95	P197 L6 - L12	John Turner testified that he "worked for The Loewen Group in Vancouver, British Columbia" for a little over 2 years.
104	9/14/95	P212 L3- L10	"Q [By Plaintiffs' counsel Mr. Gary] . . . [D]id Ray Loewen . . . send you down to Mississippi to settle the [1990] lawsuit with Jerry O'Keefe? A [John Turner] Yes, that was one of the reasons he sent me to Mississippi. Q To settle the lawsuit with Jerry O'Keefe? A Yes."
105	9/14/95	P212 L11 - L 14	"Q [Mr. Gary] And when you came down to Mississippi, did you come with the intentions of making that settlement with Jerry O'Keefe of this lawsuit in good faith? A [Mr. Turner] Of course."

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106	9/14/95	P212 L15 - L25	"Q [Mr. Gary] . . . [D]id you come to Mississippi to his office and meet with him? A [Mr. Turner] Well, Jerry had been to Vancouver on another occasion, but on the occasion that you're speaking of I came to Mississippi . . . Q Sent by Ray Loewen? A Yes. Q . . . [W]as that your first or your second meeting with Jerry O'Keefe? A. That was the second . . . ."
107	9/14/95	P213 L6 - L13	Turner testifies that when O'Keefe "came to Vancouver . . . the controversy was brewing" but he's unsure if the lawsuit was filed. He continues, ". . . [O]ne of the things . . . discussed when Mr. O'Keefe was in Vancouver was the settlement of that controversy . . .."
108	9/14/95	P213 L14 - L17	"Q [Mr. Gary] In other words, so one of the things that you discussed when he was - when he came to Canada was to try to resolve the controversy? A [Mr. Turner] Yes."
108	9/14/95	P214 L6 - L 10	"Q [Mr. Gary] Now, so obviously the case [sic] didn't get settled when he came to Canada to try to get it done, but then the second meeting was when you came down here to Mississippi to meet with him? A [Mr. Turner] That is correct."
109	9/14/95	P215 L 1 - L 11	Turner testifies that while he didn't use the word "'promise'", he did assure O'Keefe at the meeting in Mississippi that any transaction between Loewen and him "would stand or fall on its own merit based upon the judgments of management at Vancouver and not judgments of the Riemenns in Mississippi."

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110	9/14/95	P216 L13 - L25	Turner testifies that when he "met him down there in Mississippi," he assured O'Keefe that he would not make a settlement and "then have the Riemenns [sic] get with Ray Loewen."
111	9/14/95	P220 L4 - L10	Mr. Gary asked a confusing compound question to which the defense objected, and the objection was sustained. Nonetheless the damage was done, again, as follows: "Now, with respect to the Riemenns, did they, at some point in time, learn of this deal and then - and then go to Canada and confront and get with Ray Loewen on this - about this agreement or about what was happening with the deal you were making with Jerry O'Keefe to resolve this lawsuit, among other things?"
112	9/14/95	P220 L15 - L18	"Q (By Mr. Gary) Did there come a point in time when the Riemanns went up to Canada and confronted Ray Loewen about this matter? A. Yes."
113	9/14/95	P220 L 21 - L25	Mr. Turner testifies that "the Riemenns did not feel that The Loewen Group should be doing business with the O'Keefes in Mississippi . . .."
114	9/14/95	P222 L25 - P223 L17	Mr. Gary asks a question, to which the defense objects and the Judge sustains that objection, in which he says that "Ray Loewen set up there in Canada and . . . indicated that unless the deal had, in essence, their [Riemmmens'] blessings, it wouldn't happen, ..." The Judge does not instruct the jury, and the damage is thus done in spite of the sustained objection.

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115	9/14/95	P227 L 8 - L18	Mr. Turner testifies that as part of the proposal for a settlement, O'Keefe was, as Mr. Gary framed it, giving up his rights to do a cemetery and funeral in Jackson.
116	9/14/95	P237 L5 - L11	Mr. Gary asks a long question claiming that a July 1991 memo indicates that some Loewen "people had been down here in Mississippi or calling down or whatever . . . and ' . . . believed that O'Keefe is continually one step ahead of the insurance regulators' . . .."
117	9/14/95	P238 L 16 - L19	Mr. Turner responds to the question "who Don Holmstrom is", by testifying that he " . . . is a CPA, Canadien equivalent of a CPA . . . in the acquisition department of The Loewen Group . . . [who] was involved in the acquisition of the Mississippi funeral homes that The Loewen Group performed . . . ."
118	9/14/95	P257 L 9 - L23	Plaintiff's counsel focuses Mr. Turner on a portion of a 7/24/91 memo, and indicates it was written by Mr. Holmstrom of The Loewen Group, that discusses Loewen's relations with David Riemann and potential harm to "'future business in Mississippi'" and to "'Loewen's reputation in Mississippi, and especially along the Gulf Coast'" if the transaction contemplated in the settlement proposal proceeded.

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119	9/14/95	P260 L1 - L8	Mr. Turner indicates The Loewen Group was "spending somewhere between 90 and 150 million a year" in "Canadian, Canadian dollars, which at the time, if you're interested, was about 80 percent of a U.S. dollar, so convert to U.S. dollars, multiply 90 or 150 by .9, and that's about what were spending [on acquisitions per year] when I was there."
120	9/14/95	P273 L17 - P274 L15	Mr. Turner testifies he acted "on behalf of Ray Loewen and The Loewen Group" in working out an agreement with a Mr. Clemons in Pennsylvania regarding the purchase of Provident American Insurance Corporation. Mr. Gary then asks: "Q. And was it [an agreement] sent up to Canada to be signed? A. Yes."
121	9/14/95	P274 L16 - L24	Before the agreement involving Mr. Clemons was signed, however, another better offer was made to Loewen. Mr. Turner testifies that Mr. Clemons then "wanted to come to Vancouver" to talk about and try to match the other offer.
122	9/14/95	P367 L4 - L 9	Walter Blessey, President of Gulf Holdings (controlled by the O'Keefes), testifies that he resides "in Biloxi, Mississippi", "was born in Biloxi . . . and . . . lived there until [he] went off to college . . . in '57 . . . ."
123	9/14/95	P367 L16 - L20	Mr. Blessey lived out of state after college in "Oxford, Mississippi" but "returned to Biloxi in May of 1987" and has lived in Biloxi, Mississippi since then.

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124	9/14/95	P368 L5 - L8	Mr. Blessey "did an undergraduate degree at the University of Mississippi in Oxford . . . [and] attended the University of Mississippi law school. . . ."
125	9/14/95	P369 L18 - L19	Mr. Blessey is a member of "the Mississippi Society of CPAs."
126	9/14/95	P369 L23 -L24	Mr. Blessey "became a member of the bar . . . in Mississippi in January of 1964."
127	9/14/95	P370 L2 -L7	Mr. Blessey is not actively practicing law but has "been a member of the Mississippi Bar Association".
128	9/14/95	P370 L 12	Reference to Mr. Blessey's having been commissioned in the reserves as a "second Lieutenant, United States Army" upon graduation from college.
129	9/14/95	P370 L 21	Another reference to "second lieutenant in the United States Army upon graduation", in a question by Plaintiffs' counsel.
130	9/14/95	P371 L1 - L9	Mr. Blessey served in the United States Army in "West Germany" and in "South Vietnam".
131	9/14/95	P371 L15 - L17	Mr. Blessey received "the service medal for serving in Vietnam as well as the Army commendations medal for meritory [sic] service."
132	9/14/95	P374 L16 - L22	While spending quite a bit of time in Biloxi with his father who had terminal cancer in the summer of 1987, Mr. Blessey ran into Mr. O'Keefe, Sr., who asked him to consider moving "back to Biloxi and joining up with him", which he did in 1987.

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133	9/14/95	P384 L8 - L12	Mr. Blessey reviewed "all of the annual statements" and testifies, "to the best of my knowledge, the [O'Keefe] insurance companies all met the statutory requirements for capital surplus as required by the Mississippi Insurance Department."
134	9/14/95	P385 L10 - 12	Since 1992, the "auditors for all companies . . . is Haddox, Burkes, Reid and Calhoun, a CPA firm here in Jackson, Mississippi." [Before that, a New Orleans, Louisiana CPA firm had been the auditors.]
135	9/14/95	P386 L10 - L13	Although he was not the chief financial officer for the O'Keefe funeral homes in Mississippi, Mr. Blessey testifies: "to the best of my knowledge, they have not been in dire financial problems."
136	9/14/95	P389 L2 - L13	Mr. Blessey testifies that the O'Keefe organization had grown after 1987 by acquisitions in various Mississippi towns, such as "Gulfport. . . Pascagoula . . . Columbia, Mississippi . . . Meridian and Newton [Mississippi]."
137	9/14/95	P400 L10 - L22	Mr. Blessey testifies that he's known the O'Keefe family "my entire life" or, as Plaintiffs' counsel re-asked this question [for emphasis], "from birth?"
138	9/14/95	P401 L11 - L20	Mr. Blessey testifies that the O'Keefe funeral business began "down on the coast . . . [o]ver 125 years ago" and the family's insurance businesses began about "40 years ago".

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139	9/14/95	P402 L8 - P402 L3	Mr. Blessey agrees with Plaintiffs' counsel's contention that, when the O'Keefes in 1988 completed a new funeral home in Gulfport, competition then arose with the Riemann funeral home there, so that "the people over there had a choice; did they not?"
140	9/14/95	P403 L18 - P404 L16	Mr. Blessey testifies that the O'Keefe insurance companies [under the Gulf Holdings umbrella] had an excellent relationship with "the Wright family here in Jackson, Mississippi" which included Mr. Wright's serving as a director of Gulf Holdings for 3 years and being a stockholder as well.
141	9/14/95	P404 L21 - L 24	Mr. Wright [from "here in Jackson, Mississippi"] and Mr. Blessey had a personal relationship that was "extremely cordial. Mr. Wright is a very fine gentleman."
142	9/14/95	P405 L1 - L13	Mr. Wright [from "here in Jackson, Mississippi"] and the O'Keefe family insurance companies had a cordial relationship "before . . . Wright & Ferguson [funeral home] was sold to Loewen"; and Mr. Blessey testifies that Wright & Ferguson had done a trust rollover from a bank "here in Jackson" to an insurance policy with Gulf National Life Insurance Company.
143	9/15/95	P417 L6 - L21	Mr. Blessey testifies that a 1974 contract between Gulf National Life Insurance Company and the Wright & Ferguson Funeral Home "designates the Wright & Ferguson Funeral Home in Jackson, Mississippi, as - as the official funeral home for Hinds, Madison and Rankin Counties for servicing its policies."

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144	9/15/95	P417 L25 - P418 L19	Plaintiffs' counsel gets Mr. Blessey to interpret the 1974 contract, to say that Wright & Ferguson Funeral Home is the sole agent to furnish benefits on insurance policies in Hinds, Madison and Rankin Counties that are similar to those already covered by the contract.
145	9/15/95	P422 L 13 - L19	Plaintiffs' counsel asks Mr. Blessey to interpret a clause (that is, in a way very favorable to plaintiffs) in the 1987 contract between Wright & Ferguson and Gulf National. The following question is the subject of a defense objection that is sustained, but the Judge never instructs the jury to disregard counsel's clear effort to testify and thus the damage is done: "Q. Does it [the clause] encompass every kind and sort of insurance product to your knowledge that is used in Mississippi to fund funeral arrangements?"
146	9/15/95	P440 L19 - L25	Mr. Blessey testifies that from 1990 to 1991 he "spent two to three days of each week in the City of Jackson working with the sales force and the other personnel of the company in the office we had here in Jackson."
147	9/15/95	P441 L7 - L13	Mr. Blessey testifies that he would actually review insurance applications and policy lapses "where policies went away from Gulf National here in Jackson".

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148	9/15/95	P442 L 14 - L24	Plaintiffs' counsel asks a hearsay question as follows [defense counsel objected, the Judge sustained the objection, but the jury was not instructed to disregard the question and answer, so again the damage was done]: Q. Did you [Mr. Blessey] actually review - well, did you learn of directly the insurance that Family Guaranty was writing here in Jackson through Wright & Ferguson, and if you did, how? A. I was - I was informed by salespeople . . ."
149	9/15/95	P445 L2 - L6	Mr. Blessey testifies that "the Jackson market area comprised approximately 10 percent of the total insurance volume business in Gulf National companies, . . . which would be extremely valuable to any company."
150	9/15/95	P445 L16 - L25	Mr. Blessey testifies that "approximately between 15 and 16,000" people had bought Gulf National policies going through Wright & Ferguson Funeral Home.
151	9/15/95	P448 L 9 - L18	O'Keefe intended to enter the Jackson funeral market.
152	9/15/95	P449 L3 - P450 L22	Plaintiffs' counsel asks a long question about Mississippi insurance requirements, and gets Mr. Blessey to rebut a Loewen memorandum (which stated that Mississippi sources had suggested "'O'Keefe is continually one step ahead of the insurance regulators'"), by testifying that Gulf National companies had met the Mississippi capital requirements for "ordinary" insurance companies, albeit "not by much" in some cases.

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153	9/15/95	P452 L3 - P453 L4	Mr. Blessey testifies that the O'Keefes opened 2 new funeral homes and acquired 4 funeral homes in Mississippi, and all were "successful".
154	9/15/95	P453 L5 - L12	Mr. Blessey admits that the O'Keefe "family -owned insurance company provided mortgage money [to the O'Keefe family] to make these funeral home acquisitions" in Mississippi; and Plaintiffs' counsel in his questions testifies that this understandably put a strain "on a small family owned business like the O'Keefe family business . . . to finance or get the money to make those acquisitions".
155	9/15/95	P453 L17 - L21	I
156	9/15/95	P457 L2 - L15	
157	9/15/95	P457 L 17 - L22	Then, as a follow-up, Plaintiffs' counsel asks the witness to confirm that on the other side, in addition to the O'Keefes, is a "Mississippi corporation" . . . [James F. Webb Funeral Homes, Inc.] that owned the [funeral home] facilities in Meridian and Newton".
158	9/15/95	P459 L2 - L9	Plaintiffs' counsel gets Mr. Blessey to agree that if the alleged August 19, 1991 contract were carried out, Family Guaranty and/or O'Keefe trust funds were not go to Mr. O'Keefe but would be kept in Mississippi banks.

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159	9/15/95	P460 L12 - L21	Defense counsel objected to a leading and speculative question, and the Judge sustained the objection but again did not instruct the jury to disregard the substance of the inappropriate question, which was as follows: "Q. Assume . . . that Loewen has since acquired businesses having a total of 20 locations in Mississippi. Would that ability to do business through those Loewen businesses be a substantial benefit to the O'Keefe company?"
160	9/15/95	P461 L9 - L16	Mr. Blessey testifies that "[o]ur Gulf National O'Keefe family companies do business with approximately 130 funeral homes, both black and white funeral homes throughout the State of Mississippi . . ."
161	9/15/95	P461 L17 P462 L19	Mr. Blessey testifies that almost all of these Mississippi funeral homes had pre-need arrangements in a cash trust, including the homes acquired in Mississippi by Loewen, and if O'Keefe could have gotten access to the Loewen cash trusts it would have been "a direct benefit" to the O'Keefe companies.
162	9/15/95	P467 L13 - L25	Mr. Blessey testifies that Mr. John Wright [of Mississippi] was a "very thorough man" and that the two of them worked together in 1990 on an insurance trust rollover in which they also worked with "Deposit Guaranty National Bank here in Jackson" along with "a very reputable law firm here in Jackson, the Butler, Snow law firm."

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163	9/15/95	P468 L10 - L 18	Plaintiffs' counsel asks a redundant question aimed at getting Mr. Blessey to repeat [and emphasize] what he had just said about working with the local Jackson, Mississippi bank: "Q. . . . Did you work with the people at Deposit Guaranty Bank a well? A. Yes, sir, I did. . . ."
164	9/15/95	P480 L12 - P481 L7	Mr. Blessey interprets the August 1991 alleged contract to mean O'Keefe's business couldn't compete with the Riemenns west of the east boundary of the Gulfport, Mississippi city limits.
165	9/15/95	P481 L 8 - L21	Mr. Blessey interprets the August 1991 alleged contract as meaning O'Keefe would transfer to Loewen an option to enter business in Jackson, Mississippi.
166	9/15/95	P484 L12 - L21	In an objectionable and leading question, Plaintiff's counsel made a reference to a "'Commitment made in Vancouver'", allegedly by Ray Loewen to Mr. Riemann. The question clearly called for both speculation and hearsay, and the Judge sustained the objection. Again, the Judge did not instruct the jury to disregard the substance of the inappropriate question.
167	9/15/95	P487 L17 - L21	Mr. Blessey testifies that Mr. Loewen was trying to buy from O'Keefe the stock of the James F. Webb Funeral Homes in Meridian and in Newton.
168	9/15/95	P501 L25 - P502 L8	Mr. Blessey claims that Okeefe's family insurance companies were disadvantaged by not having a funeral home they could do business with in Jackson, Mississippi.

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169	9/15/95	P517 L16 - L21	Mr. Blessey claims that the O'Keefe insurance companies lost the ability to write new business in Jackson, Mississippi and the ability to have a funeral home in Jackson, Mississippi which could service policies in place.
170	9/15/95	P546 L 18 - L21	Mr. Blessey testifies that the O'Keefe insurance companies had to eliminate the "sales force in Jackson, Mississippi . . ."
171	9/18/95	P578 L4 - L 8	Mr. Blessey testifies that the insurance companies, while in regulatory supervision by the Mississippi Department of Insurance, hired a "local CPA 9/15/95" based "here in Jackson, Mississippi . . ."
172	9/18/95	P579 L 15 - L 20	A local examiner Jerry Smith also performed examinations during this time for the "Mississippi Insurance Department."
173	9/18/95	P581 L3 - P582 L 24	Several other "Mississippi Insurance Department" examiners examined the O'Keefe insurance companies while they were subject to regulatory supervision in Mississippi.
174	9/18/95	P584 L14 - P585 L9	"Mississippi Insurance Department" didn't give value to several assets of the O'Keefe insurance companies, according to Mr. Blessey, who went on to say that the O'Keefe companies would not have had to hire an actuary or enter into a reinsurance treaty if they "had the benefit of the [alleged] gain from the transaction with Loewen." [Defense counsel objected to Plaintiffs' counsel's questions, as calling for speculation as to what the Insurance Department would have thought, but Judge Graves overruled the objection.]

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175	9/18/95	P587 L17 - P588 L 7	Mr. Blessey also testifies that reappraisals of real estate were required by the Mississippi Insurance Department.
176	9/18/95	P590 L 12- P 592 L11	Mr. Blessey testifies that O'Keefe insurance companies had to pay for the Mississippi Insurance Department's attorneys.
177	9/18/95	P 595 L20 - L22	Plaintiffs' counsel offers into evidence "a time line of Loewen acquisitions in Mississippi."
178	9/18/95	P599 L17 - L19	Plaintiffs' counsel offers into evidence "a holding company system chart of the Loewen organization . . . [in] Mississippi."
179	9/18/95	P613 L12 - P615 L5	Plaintiffs introduce a summary chart of 1990 casket prices charged in Mississippi by various Loewen-owned funeral businesses.
180	9/18/95	P616 L6 - L21	Plaintiffs introduce a summary chart of 1991 casket prices at Loewen-owned businesses in Mississippi.
181	9/18/95	P617 L17 - P618 L 9	Plaintiffs introduce a summary chart of 1990-94 prices charged for "outer burial containers" at Loewen-owned funeral businesses in Mississippi.
182	9/18/95	P619 L1 - L5	Plaintiffs introduce a summary chart of 1991-94 prices charged for general funeral services at Loewen-owned funeral businesses in Mississippi.

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183	9/18/95	P625 L2 - P626 L7	Defense counsel objected, and the Judge sustained the objection without further instruction to the jury, but Plaintiffs' counsel first had Walter Blessey add up the annual premiums reported in Mississippi by Family Guaranty for 1992, 1993, 1994 and 1995, and then tried to get Mr. Blessey to testify that the $14 million total was the annual premium "the Gulf companies would have gotten had they bought this company [Family Guaranty]?"
184	9/18/95	P628 L4 - L15	Mr. Blessey testifies that, as a result of the administrative supervision of the O'Keefe insurance companies, Jerry and Jeff O'Keefe had to sell the Webb funeral homes and enter into an agreement not to compete outside of Biloxi and Ocean Springs, Mississippi for 15 years.
185	9/18/95	P646 L1 - P648 L2	Mr. Blessey testifies that O'Keefe had intended to build a new funeral home on a cemetery in Jackson, Mississippi, and Judge Graves, over defense objections that the exhibit was speculative, admitted an architect's rendering of the planned home. Blessey testifies that it is a national trend to have consolidated funeral home/cemetery operations.
189	9/18/95	P940 L15 - L25	Plaintiffs' counsel points out a 12/16/91 document written at Loewen, contains a reference to "'Shouldn't be any out re: Commitment made in Vancouver.'"

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190	9/18/95	P950 L14 - L24	Plaintiffs' counsel has Mr. Blessey explain that an SEC Form 40 F is an annual statement filed with the Securities and Exchange Commission by "foreign corporations", and shows Mr. Blessey a copy of a Form 40 F for The Loewen Group.
191	9/25/95	P1014 L13 - P1015 L17.	[Over vigorous objection by the defense that any lawsuit by James Robinson had been judicially determined against Mr. Robinson on summary judgment, the Plaintiffs called Mr. Robinson to the stand to talk about his past problems with Loewen.] Mr. Robinson began by testifying to living "in Jackson, Mississippi", having moved to Mississippi in 1959 and having been involved in numerous Mississippi funeral homes since.
192	9/25/95	P1020 L 2 - L13	After thus establishing Mr. Robinson's longstanding Mississippi roots, Plaintiffs' counsel asks him to agree that there's no real difference between the different types of insurance [burial vs. Pre-need for example], and Mr. Robinson obligingly agrees.
193	9/25/95	P1024L2 - L21	Plaintiffs' counsel tries to get Mr. Robinson to speculate as to why Loewen charges one price for a vault in Corinth, Mississippi but a lower price in Jackson, Mississippi. Mr. Robinson testifies that he "really can't". [A defense objection is sustained when Robinson tries to go ahead anyway and speculate on why. Numerous other sustained objections follow, through Page 1029.]

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194	9/25/95	P1030 L1 - L7	Objection is sustained to Plaintiffs' counsel's question as to how Mr. Robinson feels about his prior dealings with "Ray Loewen and his group".
195	9/25/95	P1032 L16 - P1033 L14	Mr. Robinson said he was worried when Loewen bought the Baldwin-Lee funeral homes, because he had a 25-year contract with them for the last 20 years and "we were just one little old small insurance company, and I didn't think they [Loewen would care much about what they did to us . . . ." Mr. Robinson claims that "they came to town, Ray Loewen did, himself. . [and] occupied my office, came to my office while he was dealing with Joe Lee . . ."
196	9/25/95	P1034 L9 - L11	Mr. Robinson testifies: "I talked with the Loewen people up there [Canada], they wouldn't give me an answer."
197	9/25/95	P1035 L 1 - L21	Plaintiffs' counsel improperly tries to put words in Mr. Robinson's mouth by asking "Q. Did they [Loewen] give you an explanation . . . as to why . . . they were not going to honor the contract . . . ? A. They didn't say they weren't going to honor the contract." Judge Graves sustained an objection on this line of questioning.
198	9/25/95	P1036 L 23 - L25	Plaintiffs' counsel asks about when Mr. Robinson "went to Canada."
199	9/25/95	P 1037 L9 - L 18	Mr. Robinson testifies "I kept making phone calls to Canada", and claims he didn't know if his contract would be honored.

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200	9/25/95	P1038 L 1 - L12	Mr. Robinson testifies that the Loewen Group "came to town", through the Family Guaranty Life Insurance Company, and went into business against him.
201	9/25/95	P1038 L 19 - L20	Plaintiffs' counsel asks if a point came when Mr. Robinson "went to Canada" ? He says yes.
202	9/25/95	P1039 L 11 - L24	Mr. Robinson claimed that his business went down after Loewen's Family Guaranty "came up from Gulfport or whatever".
203	9/25/95	P1040 L18	Mr. Robinson again states he "went to Canada".
204	9/25/95	P1041 L1	Mr. Robinson again states he "went to Canada".
205	9/25/95	P1042 L18 - P1043 L1	Plaintiffs' counsel asks Mr. Robinson if he thought Loewen was going to take care of his insurance company (by adding it to the Provident Insurance Company in Pennsylvania) "when [Mr. Robinson] left Canada".
206	9/25/95	P1047 L 1 -L13	Mr. Robinson, after saying he sued Loewen for not honoring his contract with the Baldwin-Lee funeral homes after Loewen bought them, admits that Loewen in fact "continued to service these policies where we paid them to service the policies."
207	9/25/95	P1079 L9 - L19	"Q [Plaintiff's counsel] Mr. Robinson, when you went to Canada, did you go under the impression you were going to speak to Ray Loewen when you went up there? A. Yes. Q. Did you ever get a chance to talk to him? . . . A. Well, apparently, he was too busy entertaining his guests and all."

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208	9/25/95	P1086 L16 - L19	Plaintiffs' counsel [Mr. Gary, an African-American] and Mr. Espy both tell the jury that Mr. Espy was "the first African-American to serve as an assistant secretary of state . . . in Mississippi."
209	9/25/95	P1088 L16 - L19	Mr. Espy tells the jury that Mr. Espy was "the first African-American to become assistant attorney general [in Mississippi] . . . [and] the first African-American to become a Congressman in this state since reconstruction, since the Civil War . . . ."
210	9/25/95	P1089 L19 - L21	Mr. Espy grew up in a local Mississippi church.
211	9/25/95	P1089 L23 - P1090 L21	Mr. Espy testifies that he grew up in the funeral business. He notes that his grandfather built up 35 African-American funeral homes that served the poor, and he also started the "first black hospital in the State of Mississippi." All his family worked in the funeral homes, and he and his brothers actually made caskets for the poor African-Americans the homes served.
212	9/25/95	P1091 L15- P1092 L14	Mr. Espy testifies that as he grew older, he progressed to helping with the funeral services, driving the bereaved families to and from the services, and observing his father work with burial insurance agents who sold burial insurance to be serviced by the family funeral homes.

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213	9/25/95	P1094 L1- L25	Mr. Espy [an African-American and native son of Mississippi who has done well] testifies that he knows Jerry O'Keefe, and is a friend and a stockholder in O'Keefe's companies. Mr. Espy testifies that "He's an honorable man. He's a decent guy. He keeps his word, and I certainly know that to be true, and he's a very respectable person. "
214	-9/25/95	P1095 L23 - P1096 L22	After some serious coaching from Plaintiffs' counsel Mr. Gary [himself African-American], Mr. Espy testifies that yes, as an "African-American in Mississippi", he was inspired to respect Jerry O'Keefe. Mr. Espy testifies: " You know, maybe I was being too general. . . . as an African-American, personally, . . . I can say that he [Jerry O'Keefe] didn't exhibit any bias towards a person of different race. He dealt with me as a person, no matter what color I am. . . . I can certainly say he is a man without bias and without prejudice . . . ."
215	9/25/95	P1106 L22 - P1106 L15	Mr. Espy is asked to verify that a letter in evidence is indeed from the "State of Mississippi and the attorney general's office" to The Loewen Group. He agrees, and observes that the author of the letter "used to work for me. He was one of my investigators."

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216	9/25/95	P1107 L4 - L22	Mr. Espy, prompted by Mr. Gary, reads from that letter, which makes numerous references to "foreign . . . ownership" of Mississippi funeral homes. The letter suggests it would violate the consumer protection laws of Mississippi to call a funeral home "local" if a majority interest is "foreign" owned and only a minority interest is "locally" owned.
217	9/25/95	P1107 L23 - P1108 L5	Mr. Gary then asks: "Q. Why is it important for people, no matter whether you're from Canada or from any other country to come into Mississippi and to do business and try to do business with a local company, you're a foreign company, and try to give the impression that you're something that you're not? A. For that very reason. You can't give the impression that you're something that you're not. . . ."
218	9/25/95	P1108 L9 - L21	Mr. Espy, with prompting from Mr. Gary, then says he took matters such as the one addressed in the letter to Loewen, very seriously when he worked in the Mississippi Attorney General's office, and that Mr. O'Keefe never got such a letter to his knowledge.

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219	9/25/95	P1109 L9 - L19	With prompting from Mr. Gary, *Mr. Espy testifies that "[e]verybody in America didn't agree with" NAFTA (the North American Free Trade Agreement). He goes on to agree with Mr. Gary [who is strongly leading him] that "A lot of people expressed their opinions about it [NAFTA]. They said they thought it [NAFTA] wasn't fair to the American people". Espy goes on and gives extra emphasis to this point: "Absolutely. A lot of people."* [Emphasis added.]
220	9/25/95	P1110 L5 - L8	Mr. Gary leads Espy next to agree that " . . . because you were from Canada or from Mexico . . . [it didn't mean] you could sign it [NAFTA] and have no intentions of living up to it, did it? A. True." An objection to this was sustained, but the Judge did not tell the jury to disregard the exchange, and again the damage was done. Ironically, therefore, Plaintiffs' counsel used NAFTA itself to remind the jury that a lot of "Americans" didn't like that treaty as being "unfair to Americans" (Page 1109 Lines 9 -19), and then used the treaty to attack Ray Loewen the foreigner, the Canadien, and his company (Page 1110 Lines 5-8).

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221	9/25/95	P1110 L19 - P1111 L18	Mr. Gary then calls another African-American in the funeral home business in Mississippi, Mr. Earl Banks, who lives "here in Jackson" and has been a resident all his life (41 years). He attended Jackson schools, then obtained a BA from "Jackson State University", and went to the "Mississippi College School of Law". He is a licensed attorney in "the State of Mississippi."
222	9/25/95	P1111 L22 - P1112 L5	Mr. Banks testifies that he serves "in the Mississippi House of Representatives" and that his "primary business is at People's Funeral Home where I'm resident and it is a business that my family founded in 1925. We are celebrating 70 years of service here in the City of Jackson."
223	9/25/95	P1113 L3- L20	Mr. Banks' family also has several funeral insurance businesses.
224	9/25/95	P1114 L19 - P1115 L2	The Banks' family funeral homes have served "the people", charged only "what they could afford" and "never turned away a family because of, you know, any type of financial hardship or condition that they may have had."
225	9/25/95	P1116 L3 - L20	Mr. Banks testifies that he knows Mr. O'Keefe and he met him in 1980 when he joined what had been the all white funeral directors association in Mississippi. Mr. Banks explained that historically "there were two funeral directors association, one all black, at that time, and one all white. . . ."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
226	10/6/95	P2893 L7 - 2896 L24	David Riemann, on cross-examination, was forced to read excerpts of an 8/23/91 letter he wrote to Ray Loewen in Canada, complaining that "There is too much direct orders coming from Canada.'"
227	10/6/95	P2899 L7 - L20	David Riemann then was forced to acknowledge that the 8/23/91 letter he wrote to Ray Loewen in Canada, also said "'I feel like I and my family have been treated like a redheaded stepchild, and it must change."
228	10/6/95	P2899 L21 - L22	Counsel then asked David Riemann the same question about the same statement, again, which Mr. Riemann acknowledged again.
229	10/6/95	P2918 L2 - P2919 L 9	Counsel then had David Riemann admit he and others in his family "went to Vancouver within 10 or 11 days" of the alleged August 1991 settlement agreement being signed with O'Keefe. Mr. Reimann also admitted writing a letter to John Turner in Canada objecting to certain terms of that alleged settlement agreement.
230	10/24/95	P5112 L5 - L14	In cross-examining Ray Loewen, Mr. Gary asked him if the Riemanns had "come to Canada and called you on the carpet about having lied to them . . . ." Mr. Loewen only agreed that they came to Canada.
231	10/24/95	P5119 L4 - L12	Mr. Loewen is asked about whether he "set foot in the state of Mississippi one time to work out this agreement that John Turner worked out with O'Keefe", and Mr. Loewen indicated he did not come to Mississippi and that Mr. Turner did.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
232	10/24/95	P5128 L6 - L10	Mr. Gary asks Mr. Loewen a compound question, which mainly goes to timing but which speaks of the Riemanns coming "up to Canada knocking on your door. . . ."
233	10/24/95	P5132 L5 - P5133 L14	As this reference shows, Mr. Gary repeatedly weaves references to Canada into his questions to Mr. Loewen, and asks if he gave the Riemanns a veto over the O'Keefe transaction. Mr. Loewen repeatedly denies that.
234	10/24/95	P5133 L15 - L24	Again, Mr. Gary asks if the Riemanns were given a veto when "they came all they way to Canada". Mr. Loewen says no, and Mr. Gary also asks about whether the Riemanns got to ride on Mr. Loewen's boat (Mr. Loewen says they did not).
235			
236	10/27/95	P5544 L8 - L9	Plaintiffs' counsel argues that Jerry O'Keefe was "an ace pilot who fought for his country", again trying to enflame the jury's patriotic fervor as Americans.
237	10/27/95	P5546 L1 - L10	Plaintiffs' counsel, Mr. Gary, claims he "is just a country boy" and they [the Canadiens] broke their word.
238	10/27/95	P5546 L15 - L20 and L24 L25, and P5548 L5 - L7	Mr. Gary argues that the fact Loewen sent "John Turner all the way from Canada down here" proves Loewen knew it needed to settle with O'Keefe.
239	10/27/95	P5548 L21 - L25	The case is not about John Wright, who is an "honorable" man [and also is from Mississippi].

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
240	10/27/95	P5549 L13 - L17	Plaintiffs' counsel, Mr. Gary, claims Ray Loewen used David Riemann [another Mississippian] as well.
241	10/27/95	P5549 L20 - L23	Mr. Gary asserts that another Riemann, Mike Riemann [and another Mississippian], felt that "even a dog deserves a pat on the back every now and then, and he couldn't get it from those people out of Canada."
242	10/27/95	P5550 L19 - L21	Plaintiffs' counsel next twists Loewen's understandable concerns about misleading, slanderous and defamatory anti-Canadien advertisements that O'Keefe was running, and argues that "they [Loewen] want to sue him [O'Keefe] for standing up for his country".
243	10/27/95	P5551 L10 - L23	Mr. Gary then implies that the Mississippi Attorney General's office wrote Loewen because it caught them disobeying American [Mississippi] law by "'claiming to be local when you know you're foreign'".
244	10/27/95	P5556 L16 - L20	Plaintiffs' counsel attacks the foreign Loewen Group and contrasts them with the local John Wright: "The truth is The Loewen Group and The Loewen Group international, I'm not talking about Mr. John Wright . . . but The Loewen Group international, they're terrible people, members of the jury. They're dishonorable. . .."
245	10/27/95	P5557 L11 - L12	Mr. Gary then says "They [the foreign Loewen Group] think they can come down here [that is, to Mississippi] and get over on you. I mean, they just lied."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
246	10/27/95	P5569 L14 - L21	Plaintiffs' counsel cites John Turner's testimony as indicating that the Riemanns learned of the settlement with O'Keefe and went to "Canada" and called Ray Loewen "on the carpet for lying".
247	10/27/95	P5570 L13 - L16	Counsel says it again: "Bob Riemann had to go up there [to Canada, that is] and say [to Ray Loewen], 'Wait a minute, man."
248	10/27/95	P5571 L9 - L22	Mr. Gary argues next that O'Keefe wanted John Turner not to bother with settlement talks if the Riemanns and Ray Loewen were going to get "together to conspire and kill this deal". Gary says O'Keefe told Turner, if that were true, to "'go back to Canada, and I'll come to a jury and have my case settled. That's the way we do it in America.'"
249	10/27/95	P5573 L13 - L23	Counsel again argues that John Turner knew the deal would be killed and thus "said that trip to Canada was for nothing".
250	10/27/95	P5583 L12 - L15	Plaintiff's counsel contends that O'Keefe was "down here tending to his own business in Mississippi" when Ray Loewen "put John Turner on the trail" to kill the deal like Loewen had also done with Mr. Clemons in Pennsylvania.
251	10/27/95	P5584 L1 - L21	Mr. Gary argues that Mr. Clemons had signed a contract with these people, "it was in Canada, waiting for their signature, had his [Clemon's] signature on it" when Ray Loewen got a better deal and did not sign the Clemons contract.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
252	10/27/95	P5586 L21 - L25	Plaintiff's counsel emphasizes "Canada and America" twice in the course of cleverly claiming to the jury that the case was not about "Canada and America". [One properly should ask why Mr. Gary keeps emphasizing this theme to the jury, if not *to force the jury repeatedly to focus on the foreign status of Ray Loewen and The Loewen Group*.]
253	10/27/95	P5587 L12 - L20	Mr. Gary then attacks Canada directly, twisting some of Mike Espy's comments on NAFTA. Specifically, Mr. Gary alleges: "Canadien wheat was underpriced. They [Canadiens] would come in, flood our markets, our people would eat a lot of pasta, and would not buy American wheat. They would go for cheaper wheat which was underpriced to take over the market, and then they would jack up the price, and that was not right, not consistent with what I've [Espy has] done in my life, try to protect people, protect the American market."
254	10/27/95	P5583 L12 - L15	Plaintiff's counsel again emphasizes Mike Espy's view that "'You can't pretend to be local when you're not."
255	10/27/95	P5583 L12 - L15	Mr. Gary follows up the anti-Canada and anti-NAFTA diatribe with his argument that both Mr. John Wright and Mr. Bob Riemann felt Loewen came to Mississippi, buy funeral homes, then jack up the prices "'here in Mississippi'".
256	10/27/95	P5588 L17 - L19	Plaintiff's counsel again claims that Loewen's Mississippi funeral homes improperly "pretended to be local."

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
257	10/27/95	P5588 L21 - L22	Mr. Gary again twists Loewen's concern with O'Keefe's inflammatory and anti-Canadien advertisements. Mr. Gary repeats his anti-Canadien twist: "O'Keefe jumped on it. He fought, and some died for the laws of this nation, and they're [Loewen is] going to put him [O'Keefe] down for being American."
258	10/27/95	P5593 L6 - L17	Plaintiff's counsel asserts that O'Keefe fought on against Ray Loewen because O'Keefe heard "a voice" say "fight on". Counsel then returns to the American vs. Canadien theme: "You see, that little voice, members of the jury, has a name, and it's called faith, faith in God. It's called pride, in America. . . . It is called love, love for your country, Jerry O'Keefe."
259	10/27/95	P5594 L1 - L5	Not surprisingly, Mr. Gary concludes his initial closing statement with his primary theme of American O'Keefe vs. Canadiens (Ray Loewen and The Loewen Group): ". . . [O'Keefe wanted to go fight for his country, and he fought, and he fought. We don't come seeking charity. Charity is a nuisance, but justice is calling. That's all we ask for justice, heart and soul of the American dream." In this closing argument as in the rest of the trial, Mr. Gary's actions bespeak a clear and consistent strategy of inciting the jury to blatant and improper anti-Canadien and pro-American, pro-Mississippian bias as the basis for a verdict against the Canadiens.

Reference #	Date of Trial	Transcript Reference ("P" = transcript page "L"= line)	Summary of Reference (Including Key Words or Phrases)
260	10/27/95	P5703 L17 - L19	Plaintiff's counsel had the last word after the defense closing argument. He immediately returned to the anti-Canadien theme, asserting that a key defense argument boiled down to "Excuse me. I'm from Canada. Excuse me. . . . excuse us, excuse us, excuse us. Well, they've been excused enough . . . ."
261	10/27/95	P5703 L17 - L19	In the same vein, Mr. Gary then says "it's about sleaze to protect this man [Ray Loewen, the Canadien], to protect him."
262	10/27/95	P5704 L15 - L24	Mixing anti-Canadien and racial sentiments, Mr. Gary claims that Ray Loewen took advantage of the African-American church (that is, National Baptist Convention) and intended to take from "African Americans" property "that their great grandfather's died and fought for and gave . . . to the church, and now it's going to end up in the hands of Loewen."

C

STATE OF MISSISSIPPI
OFFICE OF THE GOVERNOR

KIRK FORDICE
GOVERNOR

October 29, 1998

Chairman and Members
NAFTA Dispute Resolution Tribunal

Dear Chairman and Members:

I understand The Loewen Group intends to file a claim under the provisions of the North American Free Trade Agreement arising out of a lawsuit in Mississippi captioned *O'Keefe v. The Loewen Group,* Civil Action No. 91-67-423 (Cir. Ct. 1st Jud. Dist., Hinds County). You have asked for my views with respect to that litigation, and I understand that you intend to submit this letter to the arbitration tribunal that will resolve Loewen's claim.

It is my feeling that the *O'Keefe* verdict represents an aberration within the Mississippi Judicial system. Reports indicate that the trial was tainted by xenophobic rhetoric that may have resulted in a violation of Loewen's due process rights. Further, the $500 million verdict was shocking to me in light of the value of the underlying economic transaction, which I understand was well under $10 million.

I was very disappointed when the apparent injustice suffered by The Loewen Group was compounded by the Mississippi Supreme Court's refusal to reduce the appeal bond requirement – although expressly permitted by Mississippi Law. This may have effectively denied Loewen a meaningful opportunity to have reviewed in the Courts of our state the legal issues raised concerning the fairness and lawfulness of the trial. It greatly concerns me that the refusal by the Mississippi Supreme Court to rectify the appeal bond situation, apparently left The Loewen Group without an effective remedy and with no reasonable alternative but to settle the Judgement.

My professional life has been spent in the business world, not in the political arena. The *O'Keefe* verdict represents to me everything that is wrong with the court system, and stands as a

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vivid example of the continuing need for tort reform. It concerns me that Loewen's status as a Canadian based company may have deprived it of fundamental rights that would otherwise be guaranteed to the citizens of our state. It appears to represent a denial of justice that I can assure you is otherwise contrary to the public policies of the great state of Mississippi.

Sincerely,

KIRK FORDICE
GOVERNOR OF MISSISSIPPI

cc: Mr. James A. Wilderotter
Mr. Christopher F. Dugan

D

Professor Andreas Lowenfeld
New York University School of Law

Professor Andreas Lowenfeld will provide an expert report and/or testify in support of Loewen's claim. He will testify or opine that the Mississippi verdicts and the failure to waive the requirements for the appeal bond were a violation of NAFTA and international law because they were discriminatory, unfair and inequitable, a denial of both substantive and procedural justice, and tantamount to expropriation.

Please find attached his Curriculum Vitae.

ANDREAS F. LOWENFELD

Herbert and Rose Rubin Professor of International Law
New York University School of Law

CURRICULUM VITAE

A.B. Harvard College (M.c.L.) 1951
LL.B. Harvard Law School (M.c.L.) 1955

U.S. Army 1955-57

Practised Law with Hyde and de Vries, New York, 1958-61.

U.S. Department of State (1961-66) - Special Assistant to Legal Adviser 1961-1963; Assistant Legal Adviser for Economic Affairs 1963-1965; Deputy Legal Adviser 1965-1966.

Fellow, John F. Kennedy Institute of Politics, Harvard University, 1966-67.

Professor of Law, New York University School of Law since 1967,
Charles L. Denison Professor of Law 1981-94.
Herbert and Rose Rubin Professor of International Law 1994-

Visiting Professor, Stanford Law School - Summer 1969, 1972.

Lecturer, U.S. Foreign Service Institute - Summer 1973.
Salzburg Seminar in American Studies - Summer 1974.

Professor, Institute on International and Comparative Law, Paris, Summer 1976, 1986; London, Summer 1980; Dublin, Summer 1983; Moscow, Leningrad, Warsaw, Summer 1991.

Lecturer, Hague Academy of International Law, Summer, 1979.
General Course in Private Int'l Law, Summer 1994.

Arbitrator: Numerous cases under rules of International Chamber of Commerce, UN Economics Commission for Europe, International Air Transport Association, American Arbitration Association, United Nations Commission on International Trade Law, Stockholm Chamber of Commerce, and ad hoc arbitrations.

Member: Institut de Droit International
Board of Directors, Int'l Institute of Air & Space Law

Associate Member: 3 Verulam Buildings, Gray's Inn London

Courses:

International Law and Institutions	Civil Procedure
International Economic Transactions	Conflict of Laws
International Litigation	Torts
International Arbitration	Aviation Law
Comparative Civil Procedure	

Organizations:

Association of the Bar, City of New York
Committee on Foreign and Comparative Law
Aeronautics Committee
International Law Committee

American Bar Association
Section of International Law
Section of Antitrust Law
Ad Hoc Task Force on Extraterritorial Application of U.S. Law

American Society of International Law
Panel on Foreign Economic Policy
Trade Issues Review Group
Review Group on International Transfer of Technology

American Arbitration Association
Panel on Commercial and International Arbitration
Arbitration Law Committee, Commercial Section and International Law Section

Chartered Institute of Arbitrators (London)

Council on Foreign Relations
Study Group on International Aviation (Chairman)
Study Group on Internationalization of Banking
Study Group on International Trade Negotiations
Study Group on United States-Canada Trade Negotiations
Study Group on North American Free Trade Agreement

International Chamber of Commerce, Corresponding Member, Academic Council of Institute of International Business Law and Practice

United States Chamber of Commerce
Reporter: Task Force on International Transfer of Technology

American Law Institute
Associate Reporter, Restatement (Third) of Foreign Relations Law (1979-1988).
Consultant, U.S. Income Tax Treaty Project (1989-91)
Consultant, Complex Litigation Project (1989-)

Board of Editors:
American Journal of International Law (1978-90, 1991-)
Journal of Air Law and Commerce
Journal of Maritime Law and Commerce
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Spring 1998

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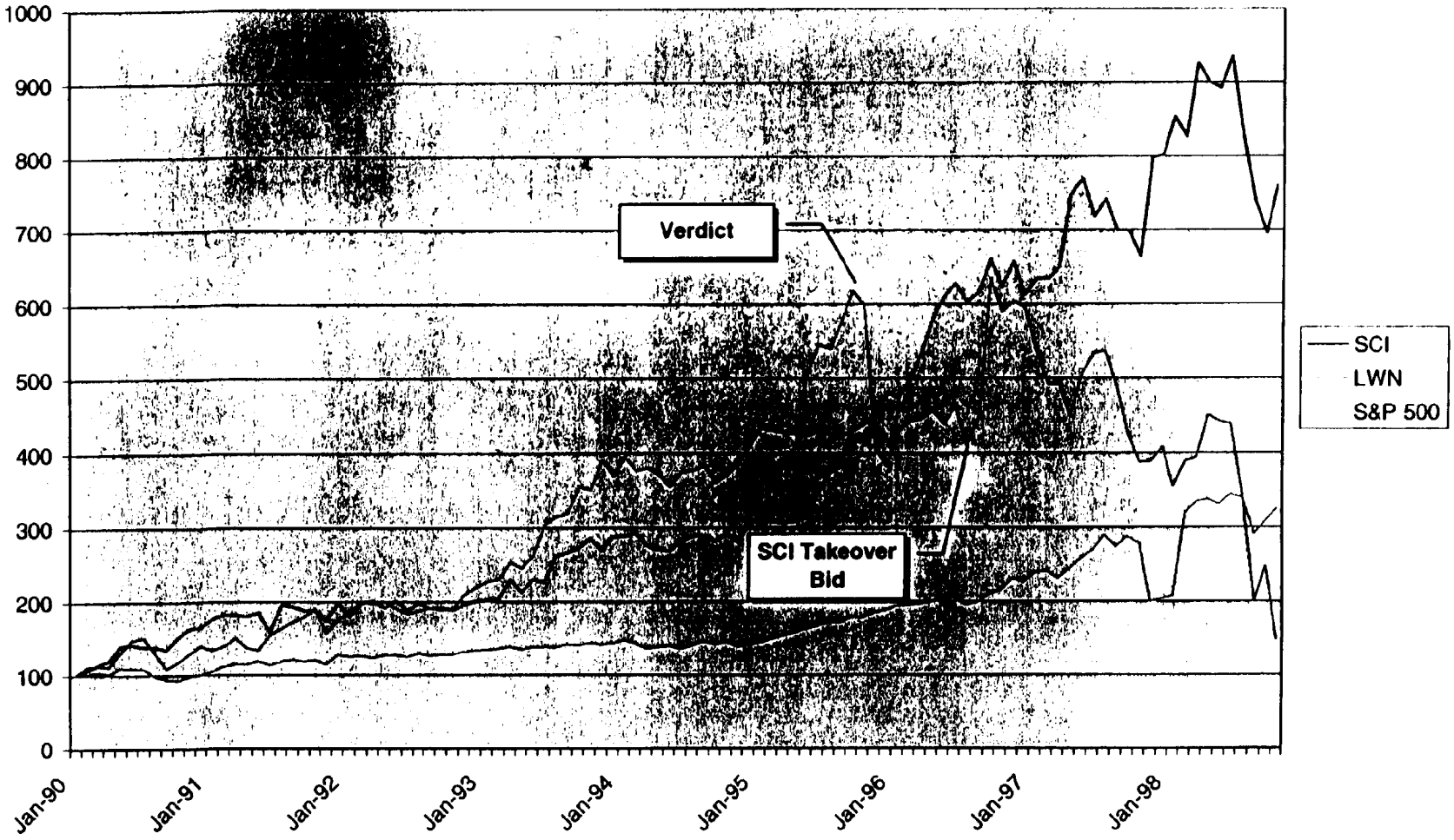
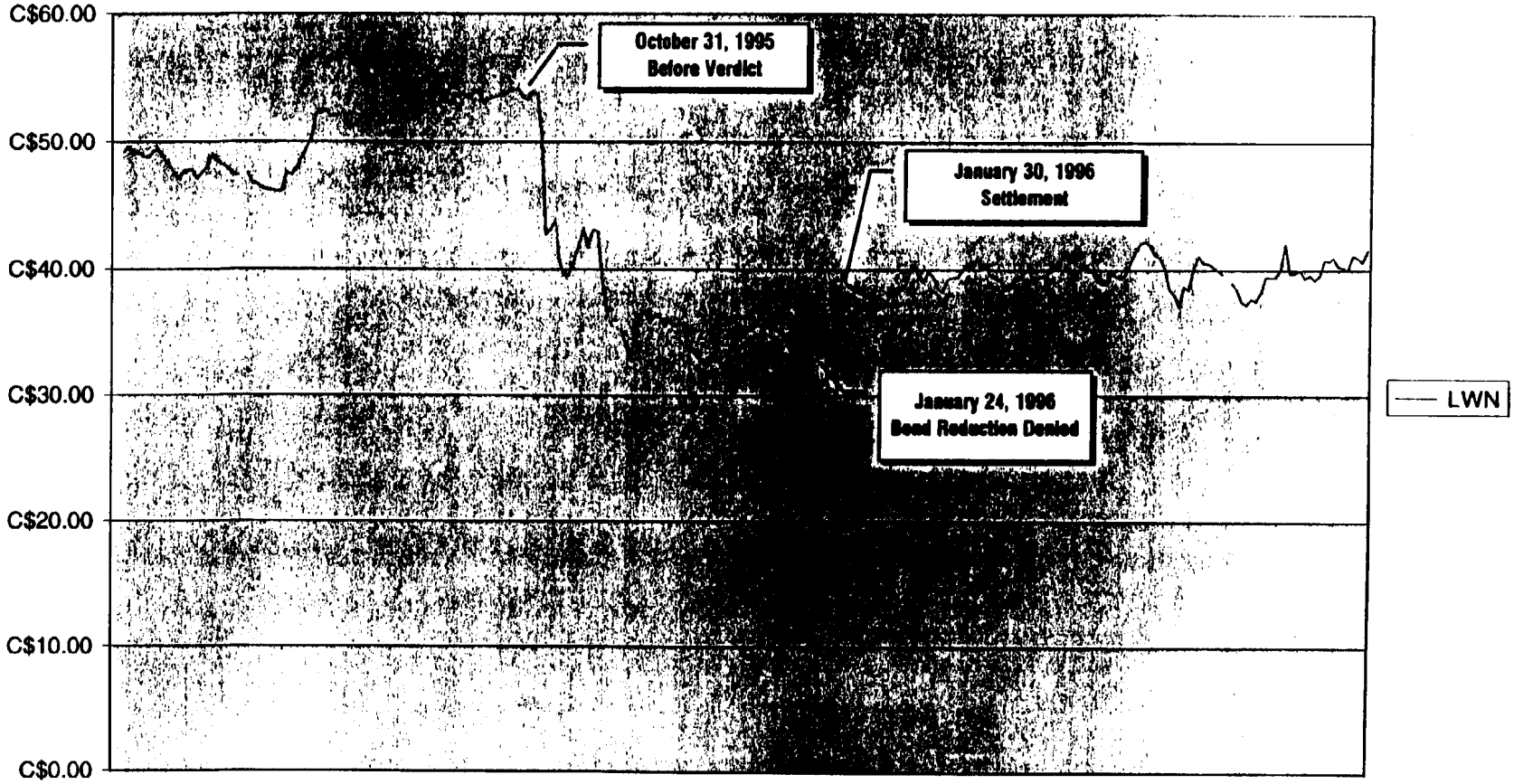
January 1990 - October 1998



LOEWEN GROUP INC

Weekly Share Price - Toronto Stock Exchange

July 1, 1995 - June 30, 1996



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IN THE MATTER OF:

The Loewen Group, Inc. and
Raymond L. Loewen,

Claimants/Investors,

v.

The United States of America,

Respondent/Party.

CONSENT TO ARBITRATION and WAIVER OF OTHER DISPUTE SETTLEMENT PROCEDURES

PURSUANT TO Articles 1120 and 1121 of the North American Free Trade Agreement (NAFTA), Chapter II of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, and the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (ICSID, or the Centre), Claimants/Investors The Loewen Group, Inc. and Raymond L. Loewen hereby —

(a) Consent to arbitration in accordance with the procedures set out in NAFTA;

(b) Waive their rights to initiate or continue, before any administrative tribunal or court under the law of any party to NAFTA or any other dispute settlement procedures, any proceedings with respect to any measure that the Claimants/Investors allege to be a breach of NAFTA referred to in Articles 1116 and 1117 (except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the United States of America);

(c) Consent to submit their NAFTA claim to ICSID for arbitration under the Arbitration (Additional Facility) Rules of the Centre;

(d) Consent to the jurisdiction of the Centre under Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted; and

(e) Request, pursuant to Article 4 of the Arbitration (Additional Facility) Rules, that the Secretary-General of ICSID approve access to the Additional Facility and register Claimants/Investors' Notice of Claim in the Centre's Arbitration (Additional Facility) Register.

PURSUANT TO Article 1121 of NAFTA, Loewen Group International, Inc. (the Enterprise) hereby waives its own rights to initiate or continue, before any administrative tribunal or court under the law of any party to NAFTA or any other dispute settlement procedures, any proceedings with respect to any measure that the Claimants/Investors allege to be a breach of NAFTA referred to in Articles 1116 and 1117 (except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the United States of America).

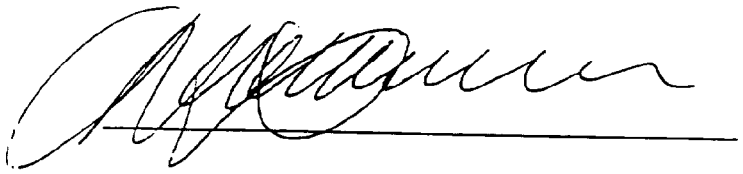
I, Bradley D. Stam, have been duly authorized by the Board of Directors of The Loewen Group, Inc. to execute this CONSENT TO ARBITRATION and WAIVER OF OTHER DISPUTE SETTLEMENT PROCEDURES on behalf of Claimant/Investor The Loewen Group, Inc.

Bradley D. Stam

THE LOEWEN GROUP, INC.

By:
Bradley D. Stam
Senior Vice President, Law

RAYMOND L. LOEWEN



CONSENT TO ARBITRATION and
WAIVER OF OTHER DISPUTE SETTLEMENT PROCEDURES

I, Bradley D. Stam, have been duly authorized by the Board of Directors of Loewen Group International, Inc. to execute this CONSENT TO ARBITRATION and WAIVER OF OTHER DISPUTE SETTLEMENT PROCEDURES on behalf of the Enterprise Loewen Group International, Inc.

Bradley D. Stam

LOEWEN GROUP INTERNATIONAL, INC.

By:
Bradley D. Stam
Senior Vice President, Law

CERTIFICATION OF SERVICE

I, Gregory Andrew Castanias, certify by my signature below that I have caused a true and correct copy of the foregoing CONSENT TO ARBITRATION and WAIVER OF OTHER DISPUTE SETTLEMENT PROCEDURES to be served upon the following individuals, by hand delivery, on this 30th day of October, 1998.

Robert J. McCannell, Esq.
Executive Director
Office of the Legal Advisor
Suite 5519
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Kenneth Doroshow, Esq.
United States Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W.
Washington, D.C. 20530

Gregory Andrew Castanias

WA: 1039002v1

G

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TAIPEI
TOKYO

JONES, DAY, REAVIS & POGUE
METROPOLITAN SQUARE
1450 G STREET, N.W.
WASHINGTON, D.C. 20005-2088

TELEPHONE: 202-879-3939
FACSIMILE: 202-737-2832
WRITER'S DIRECT NUMBER:
(202) 879-3432

July 29, 1998

VIA MESSENGER

Robert J. McCannell
Executive Director
Office of the Legal Advisor
Suite 5519
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Sir:

Pursuant to the notice requirements of Article 1119 of the North American Free Trade Agreement ("NAFTA"), The Loewen Group Inc. and Ray Loewen, on behalf of himself and other Canadian shareholders of The Loewen Group, hereby give written notice of their intention to submit to arbitration a claim against the United States pursuant to Article 1116 and/or 1117 of NAFTA.

(a) The names and addresses of the disputing investors are:

The Loewen Group Inc.
4126 Norland Avenue, Burnaby
British Columbia, Canada V5G 3S8, and/or

Ray Loewen
4126 Norland Avenue, Burnaby
British Columbia, Canada V5G 3S8,
on behalf of himself and as representative of all other Canadian shareholders of The Loewen Group Inc. damaged by the acts complained of herein.

The name and address of the enterprise is:

Loewen Group International Inc.
50 East Rivercenter Boulevard
Covington, Kentucky 41011-1650

(b) The claim will allege that the United States breached its duties under NAFTA Articles 1102, 1103, 1105, and 1110.

(c) These allegations arise from a case tried in the courts of the State of Mississippi, O'Keefe v. The Loewen Group Inc., Civil Action No. 91-67-423 (Cir. Ct. 1st Judicial Dist., Hinds County, Miss.). In that action, a jury rendered a biased and excessive $500 million verdict against Loewen Group International and The Loewen Group (collectively "Loewen"). The Mississippi trial court then refused to set aside the verdict, entered judgment on the verdict, and the Mississippi Supreme Court refused to reduce the $625 million bond required to obtain a stay of execution pending appeal. These events caused a drop in market value of approximately $550 million and a consequent loss in market share and business reputation and forced Loewen, under duress, to abandon its appeal of the judgment and to settle what had begun as an approximately $8 million breach-of-contract case for an exorbitant $175 million.

Under Article 105, the United States is responsible for ensuring that its states observe the provisions of NAFTA. The biased and excessive verdict, the trial court's refusal to vacate it, and the refusal to reduce the bond required for a stay of execution pending appeal violated the requirement of non-discriminatory treatment of Canadian investors and their investments under Articles 1102 and 1103. Similarly, these actions breached the duty under Article 1105(1) to treat the investments of Canadian investors "in accordance with international law, including fair and equitable treatment and full protection and security." Finally, these actions were "tantamount" to an "expropriation" in violation of Article 1110(1).

(d) The Loewen Group and/or its Canadian investors will seek full compensation for the losses and other injuries suffered as a result of these breaches, and claim at least $725 million in compensatory damages plus interest, costs, and any other ancillary relief that the arbitrators might deem appropriate.

Very truly yours,

Christopher F. Dugan

James A. Wilderotter

James A. Wilderotter
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Suite 600
Washington, D.C. 20005

AFFIDAVIT OF G. DANIEL McCAFFREY

District of Columbia: SS

G. Daniel McCaffrey, being first duly sworn on oath, deposes and states as follows:

1. My name is G. Daniel McCaffrey and I am employed as a legal assistant by the law firm of Jones, Day, Reavis & Pogue in Washington, D.C.

2. On Wednesday, July 29, 1998, I hand delivered a sealed envelope addressed to Mr. Robert J. McCannell, Executive Director, Office of the Legal Advisor, Suite 5519, Department of State, to Ms. Harleta Griffin of the Office of the Legal Advisor at the Department of State. The envelope contained a notice submitted on behalf of The Loewen Group of their intention to submit to arbitration under Chapter 11 of NAFTA. The letter is attached.

G. Daniel McCaffrey

Sworn to and subscribed before me this 31st day of July, 1998.

Witness

Notary Public

My commission expires:

Rocco A. Benedetto, Jr.
Notary Public District of Columbia
My commission expires October 31, 1999

York Regional Office.[3] Unless the Commission objects to the consultant's recommendations within thirty days, applicants will implement the consultant's recommendations by no later than forty days after the end of the period for the Commission to object.

8. Applicants state that they have not been the subject of prior Commission enforcement proceedings, and have not previously filed an application for relief pursuant to section 9(c) of the Act.

Applicants' Condition

Applicants agree that any order granted by the Commission pursuant to the application will be subject to the condition that NBD will comply with the Final Judgment.

Temporary Order

The Commission has considered the matter and, without necessarily agreeing with all the facts represented or all of the arguments asserted by applicants, finds that the issuance of a temporary order under section 9(c) of the Act, subject to the foregoing condition, is not inconsistent with the public interest or the protection of investors.

Accordingly, it is hereby ordered, under section 9(c) of the Act, that applicants and their affiliated persons be, and hereby are, granted a temporary exemption from the provisions of section 9(a) of the Act, solely with respect to the Final Judgment, subject to the condition contained in the application, which condition is expressly incorporated herein, pending the Commission's determination with respect to the permanent order.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-31419 Filed 12-23-93; 8:45 am]

BILLING CODE 8010-01-M

[3] Applicants state that in a report dated July 12, 1993, an independent consultant concluded that, based on its review, the policies and procedures of the custodian securities clearing operations for non-investment adviser accounts of NBD are reasonably designed to ensure compliance with the requirements of Regulation U. Applicants state that the recommendations of the independent consultant have been implemented.

DEPARTMENT OF STATE

Bureau of Administration

[Public Notice 1919]

North American Free Trade Agreement

Notice is hereby given that the Department of State is the federal agency to which notices and other arbitration documents are to be delivered pursuant to Article 1137(2) and Annex 1137.2 of the North American Free Trade Agreement. Delivery should be made to the attention of the Office of the Legal Adviser, Executive Director (L/EX).

Dated: December 13, 1993.

Ted A. Borek,

Assistant Legal Adviser, Economic Business and Communication Affairs.

[FR Doc. 93-31790 Filed 12-23-93; 8:45 am]

BILLING CODE 4710-08-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD08-93-030]

Houston/Galveston Navigation Safety Advisory Committee; Meeting

AGENCY: U.S. Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: The Houston/Galveston Navigation Safety Advisory Committee will meet on Thursday, January 27, 1994, in the conference room of the Houston Pilots Office, 8150 South Loop East, Houston, Texas. The meeting is scheduled to begin at approximately 9 a.m. and end at approximately 1 p.m. The agenda for the meeting consists of the following items:

1. Call to Order.
2. Presentation of the minutes of the Inshore and Offshore Waterways Subcommittees and discussion of recommendations.
3. Discussion of previous recommendations made by the Committee.
4. Presentation of any additional new items for consideration of the Committee.
5. Adjournment.

The purpose of this Advisory Committee is to provide recommendations and guidance to the Commander, Eighth Coast Guard District, on navigation safety matters affecting the Houston/Galveston area.

The meeting is open to the public. Members of the public may present written or oral statements at the meeting.

FOR FURTHER INFORMATION CONTACT: J.P. Novotny, LT, USCG, Recording Secretary, Houston/Galveston Navigation Safety Advisory Committee, c/o Commander, Eighth Coast Guard District (oan), room 1211, Hale Boggs Federal Building, 501 Magazine Street, New Orleans, LA 70130-3396, telephone number (504) 589-6235.

Dated: December 8, 1993.

J.C. Card,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 93-31514 Filed 12-23-93; 8:45 am]

BILLING CODE 4910-14-M

[CGD 08-93-032]

Houston/Galveston Navigation Safety Advisory Committee; Offshore Waterway Management Subcommittee Meeting

AGENCY: U.S. Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: The Offshore Waterway Management Subcommittee of the Houston/Galveston Navigation Safety Advisory Committee will meet on Thursday, January 6, 1994, at West Gulf Maritime Association, Portway Plaza, suite 200, 1717 East Loop, Houston, Texas 77029. The meeting is scheduled to begin at 9 a.m. and end at 10:30 a.m. The agenda for the meeting consists of the following items:

1. Call to Order.
2. Discussion of previous recommendations made by the full Advisory Committee and the Offshore Waterway Management Subcommittee.
3. Presentation of any additional new items for consideration by the Subcommittee.
4. Adjournment.

The meeting is open to the public. Members of the public may present written or oral statements at the meeting.

FOR FURTHER INFORMATION CONTACT: J.P. Novotny, LT, USCG, Recording Secretary, Houston/Galveston Navigation Safety Advisory Committee, c/o Commander, Eighth Coast Guard District (oan), room 1211, Hale Boggs Federal Building, 501 Magazine Street, New Orleans, LA 70130-3396, telephone number (504) 589-6235.

Dated: December 8, 1993.

J.C. Card,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 93-31516 Filed 12-23-93; 8:45 am]

BILLING CODE 4910-14-M

[CGD 08-93-031]

Houston/Galveston Navigation Safety Advisory Committee; Inshore Waterway Management Subcommittee Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: The Inshore Waterway Management Subcommittee of the

JONES, DAY, REAVIS & POGUE

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TELEPHONE: 202-879-393
FACSIMILE: 202-737-2832
WRITER'S DIRECT NUMBER

(202) 879-3432

September 25, 1998

VIA MESSENGER

Robert J. McCannell
Executive Director
Office of the Legal Adviser
Suite 5519
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Re: Loewen Arbitration Claim

Dear Sir:

On July 29, 1998 we delivered to you a written notice of intent by The Loewen Group, Inc. and Ray Loewen, on behalf of himself and other Canadian shareholders of The Loewen Group, to submit to arbitration a claim against the United States under the North American Free Trade Agreement ("NAFTA"). Such notice was prepared in accordance with Article 1119 of NAFTA and delivered to your office pursuant to Article 1137(2) and Annex 1137.2. A copy is enclosed. Pursuant to NAFTA Article 1118, we are available to meet with representatives of the United States at your convenience.

Very truly yours,

Christopher F. Dugan

James A. Wilderotter

Enclosure

WA: 1016846v1

CERTIFICATION OF SERVICE

I, Gregory Andrew Castanias, certify by my signature below that I have caused a true and correct copy of the foregoing NOTICE OF CLAIM to be served upon the following individuals, by hand delivery, on this 30th day of October, 1998.

Robert J. McCannell, Esq.
Executive Director
Office of the Legal Advisor
Suite 5519
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Kenneth Doroshow, Esq.
United States Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W.
Washington, D.C. 20530

Gregory Andrew Castanias

WA: 1041283v1